

A
DIGEST
OF THE
Laws of England
RESPECTING
REAL PROPERTY.

BY WILLIAM CRUISE,
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

VOLUME THE THIRD,

CONTAINING

Title 21. ADVOWSON.	Title 27. FRANCHISES.
22. TITHES.	28. RENTS.
23. COMMON.	29. DISSEISIN.
24. WAYS.	30. ESCHEAT.
25. OFFICES.	AND
26. DIGNITIES.	31. PRESCRIPTION.

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A
DIGEST
OF THE
Laws of England
RESPECTING
REAL PROPERTY.



TITLE XXI.
ADVOWSON.

CHAP. I.
Of the Origin and Nature of Advowsons.

CHAP. II.
Of Presentation, Institution, and Induction.

CHAP. I.
Of the Origin and Nature of Advowsons.

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| § 1. <i>Of Incorporeal Property.</i> | § 20. <i>Donative.</i> |
| 3. <i>Origin of Advowsons.</i> | 23. <i>What Estate may be had in.</i> |
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* The law of advowsons is here only discussed as far as lay patrons are concerned.

Section 1.

Of Incorporeal
Real Property.

HAVING treated in the preceding titles, of corporeal real property or land, it will now be necessary to explain the nature of incorporeal property, and the rules by which it is governed.

Tit. 1. f. 2.

Incorporeal property consists of rights and profits arising from or annexed to land; their existence is merely in idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses.

§ 2. The principal kinds of incorporeal property are advowsons, tithes, commons, ways, offices, dignities, franchises, and rents. Sir *William Blackstone* has added to these, two others; corrodiess, and annuities, which are not deserving of a particular discussion.

Origin of
Advowsons.
1 Inst. 17 b.
119 b.
Watf. Comp.
Incumb. 64.
Fol. Edit.
1725.

§ 3. In the early ages of christianity, the nomination of all ecclesiastical offices belonged to the church; and when the piety of some lords induced them to build churches upon their own estates, and to endow them with glebe lands, or to appropriate the tithes of the neighbouring lands to their support, the bishops, from a desire of encouraging such pious undertakings, permitted those lords to appoint whatever person they pleased to officiate in such churches, and receive the emoluments annexed to them; reserving, however, a power to themselves to judge of the qualifications of those who were thus nominated.

§ 4. This

§ 4. This practice, which was originally a mere indulgence, became, in process of time, a right; and all those who had either founded or endowed a church, claimed and exercised the exclusive privilege of presenting a clerk to the bishop, whenever the church became vacant.

§ 5. An advowson is therefore a right of presentation to a church or ecclesiastical benefice. The word is derived from *advocatio*, which signifies, *in clientelam recipere*; for, in former times, the person to whom this right belonged, was called *advocatus ecclesiæ*, because he was bound to defend and protect, both the rights of the church, and the incumbent clerks, from oppression and violence. Hence the right of presentation acquired the name of advowson, and the person possessed of this right was called the patron of the church.

Description
of.
1 Inst. 17 b.

Watf. 65.

§ 6. The right of presentation, and that of nomination, are sometimes confounded; but they are distinct things. Presentation is the offering a clerk to the bishop. Nomination is the offering a clerk, to the person who has the right of presentation. And these rights may exist in different persons at the same time. Thus a person seized of an advowson may grant to *A.* and his heirs, that whenever the church becomes vacant, he will present such person as *A.* or his heirs shall nominate. This is a good grant; and the person who has the right of nomination is, to most purposes, considered as the patron of the church.

Right of No-
mination.
Plowd. 529.
Watf. 90.

§ 7. Where the legal estate in an advowson is vested in trustees, they have the right of presentation in them; but the right of nomination is in the *cestuique* trust.

Advowsons
appendant.

§ 8. The right of presentation which was originally allowed to the person who built or endowed a church, became by degrees annexed to the manor in which it was erected: for the endowment was supposed to be parcel of the manor, and therefore it was natural that the right of presentation should pass with the manor, from whence the advowson was said to be appendant, being so closely annexed to the manor, that it will pass as incident thereto, by a grant of the manor, without any other words.

Inst. 122 a.
1 Leon. 207.
Doderidge
Adv. Lect. 8.

§ 9. An advowson is appendant to the demesnes of the manor, which are of perpetual subsistence and continuance, and not to the rents or services, which are subject to extinguishment and destruction.

Long and
Hemmings
Case, 1 Leon.
207.

§ 10. It was found in a special verdict, that the abbot of S. was seised of a capital messuage in F., and of 100 acres of land there, and that there was a tenancy holden of such capital messuage by certain services, and that the said capital messuage had been known time out of mind by the name of the manor of F., and that the advowson was appendant to it. The court was of opinion, that here was a sufficient manor to which an advowson might be well appendant.

§ 11. It is said, that if a person be seised of a manor to which an advowson is appendant, and he grants one or two acres of the manor, *una cum advocacione*, the advowson will become appendant to such one or two acres; but the land and the advowson must be granted by the same clause. Watf. 67.

§ 12. Where the property of an advowson has been once separated from the manor by any legal conveyance, it is then called an advowson in gros; and never can be appendant again, except in a few cases, which will be mentioned hereafter. Advowsons in Gros.

§ 13. An advowson appendant may become an advowson in gros by various means. 1st, If the manor to which it is appendant is conveyed away in fee-simple, with an exception of the advowson. 2d, If the advowson is conveyed away without the manor to which it is appendant. 3d, If the proprietor of an advowson appendant presents to it as an advowson in gros. Watf. 68.
Id. 69.
2 Wood. 63.

§ 14. Where a manor to which an advowson is appendant descends to coparceners, who make partition of the manor, with an express exception of the advowson, it ceases to be appendant, and becomes an advowson in gros. But if parceners make partition of a manor to which an advowson is appendant without saying any thing of the advowson, it remains in coparcenary, and yet in every of their turn, it is appendant to that part which they have. 1 Inst. 122a.

Watf. 69.

§ 15. An advowson may, however, cease to be appendant for a certain time, and yet become again appendant. Thus, if an advowson is excepted in a lease for life of a manor, it becomes an advowson in gross, during the continuance of the lease. But upon the expiration of the lease, it again becomes appendant.

If an advowson is granted for life, and another person enfeoffed of the manor to which it is appendant, with the appurtenances in fee-simple, in such case the reversion of the advowson passes; and at the expiration of the first grant, it will again become appendant.

6 Rep. 64.

§ 16. If a manor to which an advowson is appendant descends to two coparceners, and, upon a partition, the advowson is allotted to one of the coparceners, and the manor to the other, by this means the advowson is become in gross. But if the coparcener to whom the advowson was allotted dies without issue, and without disposing of the advowson, it will go to the other sister, and again become appendant.

Dyer 259 a.
and b.

§ 17. An advowson may be appendant for one turn, and in gross for another. Thus, if a person having an advowson appendant, grants every second presentation for the future to a stranger. The advowson will be in gross, for the turn of the grantee, and appendant for the turn of the grantor.

§ 18. Advowsons

§ 18. Advowsons are also presentative, collative, and donative. Advowsons
Presentative.

An advowson presentative, is where the patron has a right of presentation to the bishop or ordinary, and, moreover, to demand of him to institute his clerk, if he finds him canonically qualified. 2 Comm. 22.

§ 19. An advowson collative is, where the bishop and patron are one and the same person; in which case, the bishop cannot present to himself; but he does by the one act of collation, or conferring the benefice, the whole that is done in common cases, by both presentation and institution. Collative.

§ 20. An advowson donative is, when the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, and not to that of the ordinary, and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction. Donative.
1 Inst. 344 a.

§ 21. Lord *Coke* says, that if the patron of a donative doth once present to the ordinary, and his clerk is admitted and instituted, the church is by that means become presentative, and shall never after be donative. Idem.

§ 22. The existence of an advowson, like that of every other incorporeal hereditament, being merely in idea, and abstracted contemplation, it is not capable How a Seisin
is acquired.

1 Inst. 29 a.

of a corporeal seisin or possession; and, therefore, a presentation to the church is allowed to be equivalent to a corporeal seisin of land. But until the church becomes void, it is impossible to acquire any thing more than a seisin in law of an advowson.

What Estate
may be had

§ 23. A person may be tenant in fee-simple of an advowson, as well as of a piece of land; in which case, he and his heirs have a perpetual right of presentation to the church.

An advowson may be intailed within the statute *De Donis Conditionalibus*, being an hereditament annexed to land. It may also be limited to a person for life or years, in possession, remainder, or reversion.

Dower and
Curtesy.

Watts, 89.

§ 24. Where a widow is endowed of a manor to which an advowson is appendant, she becomes entitled to such advowson, and if the church becomes vacant during the continuance of her estate in the manor, she may present to it. And if a widow be endowed of a third part of a manor, to which an advowson is appendant, the third part of the advowson shall pass therewith.

1 Inst. 32 a.
Howard v.
Cavendish,
Cro. Jac. 621.

§ 25. A woman is also dowable of an advowson in gross, and the assignment shall be of the third presentation to the church.

1 Inst. 379 a.

Lord *Coke* says, if a man seised of an advowson in fee marries, his wife, by act in law, acquires a title to the third presentation; then, if the husband grants the

the third presentation to a stranger, and dies, the heir shall present twice, the wife shall have the third presentation, and the grantee the fourth ; for in this case it shall be taken, the third presentation which he might lawfully grant.

§ 26. A husband shall be tenant by the curtesy of an advowson, though the church was not void during the coverture ; for although, in this instance, the husband had but a seisin in law, yet as he could by no industry, attain any other seisin, it shall be sufficient. *Et impotentia excusat legem.* 1 Inst. 29 a.

§ 27. This point was determined in 21 *Edw.* 3. ; and the case is thus stated by *Brooke*. Ab. Tit. Tenant per le Curtesy, pl. 2.

In a *quare impedit* by the king against divers, the defendant made title that the advowson descended to three coparceners, who made partition to present by turns ; that the eldest had her turn, and after the second her turn, and he married the youngest and had issue by her, and she died, the church voided, so it belonged to him to present, and did not allege that his wife ever presented, so as she had possession in fact. It was admitted, that he might be tenant by the curtesy by the seisin of the others.

§ 28. Although an advowson become void during the coverture, and the wife die after the six months past, before any presentment by the husband, so that the ordinary presents for lapse to that avoidance ; yet the husband Perk. l. 468, vide 1 Inst. 29 a. n. 5.

husband shall present to the next avoidance, as tenant by the curtesy.

May be alien-
ed.

§ 29. An advowson appendant may be aliened by any kind of conveyance which transfers the manor to which it is appendant, even without the words *cum pertinentiis*.

Tit. 32.

Infra. ch. 2.

§ 30. An advowson in gross being an incorporeal inheritance, and not lying in manual occupation, does not pass by livery; but may be granted by deed. And although the law does not consider the exercise of the right of presentation, as of any pecuniary value, or a thing for which a price or compensation ought to be accepted, yet the general right to present is considered as valuable, and an object of sale, which may be conveyed for a pecuniary, or other good consideration.

Grant of the
next presen-
tation.

§. 31. An advowson may not only be aliened to a person in fee, for life, or years; but the next presentation, or any future number of presentations may be granted.

Ante f. 25.

§. 32. It has been stated that where a married man granted the third presentation to a living, his wife being intitled to such third presentation, as part of her dower, the grantee should have the next presentation after the wife's, because the wife's title arose from an act of law which shall not operate to the prejudice of the grantee. But where a man granted the next presentation to *A.* and before the church became void,

† Inst. 378 b.

void, he granted the next presentation of the same church to *B.* The second grant was void, for his right of presentation was destroyed by the act of the party; not as in the former case, by an act in law.

§. 33. It has been determined in a modern case, that a grant of the next presentation to a church, does not become void by the crown's acquiring a right to present.

§. 34. Sir *Kenrick Clayton* being seized in fee of an advowson, the church being then full, by a deed poll granted to *M. Kenrick Esq.* his executors, &c. the next presentation donation and free disposition of the said church, as fully freely* and entirely as the said *Sir K. Clayton* or his heirs.

Troward v. Cailland,
2 H. Black.
Rep. 324.
6 Term Rep.
439. 778.

The person who was then incumbent, was made bishop of *Rocheſter*; whereby the church became vacant, and the king by reason of his royal prerogative became entitled to present a fit person to the said church.

It was contended that in the event that had happened, this grant became void, and that in the case of *Woodley v. Episc. Exeter* it was held that the grantee of the next avoidance must have the next or none at all; and must lose his right by the intervention of the prerogative, on the promotion of the incumbent to a bishopric.

Cro. Jac. 691.
Winch. 94.

On the other side it was argued that the authority of the case of *Woodley v. Episc. Exeter* was expressly contradicted by the note in the margin of *Dyer* 228. b. (which was apparently the same case) where it was stated to have been resolved by the court, that the grantee should have the next avoidance after the prerogative presentation; because that was the act of law; and the prerogative of the king, which excluded him from the first presentation, injures no one.

The Court of Common Pleas held that the grantee of the next presentation should present on the next vacancy, occasioned by the death or resignation of the king's presentee.

8 Bro. Parl.
Ca. 71.

This judgment was affirmed by the Court of King's Bench and afterwards in the House of Lords with the assent of the judges.

Dymoke v.
Hobart,
1 Bro. Parl.
Ca. 108.

§. 35. Where a person has only a particular estate in a manor, to which an advowson is appendant, he can of course only alien the advowson for so long as his estate shall continue, so that if a tenant for life grants the next presentation to a church, it is void against the remainder man.

Infra Ch. 2.

§. 36. An advowson may also be aliened by way of mortgage but though the church becomes vacant before the mortgage is paid, the mortgagee cannot present.

§. 37. It is said by Lord *Coke* that an advowson is affets to satisfy a warranty, but an advowson in gross is not extendible upon a writ of *elegit*, because no annual value can be set upon it.

Is affets.
1 Inst. 374 b.
3 Atk. 464.
Cro. Eliz.
359.
W. Jones 24.
3. P. Wms.
401.

§. 38. An advowson in gross; whether the proprietor has a legal or an equitable interest therein, is affets for the payment of debts, and will be directed, by the Court of Chancery, to be sold for that purpose.

§. 39. *John Tong* being indebted to several persons by judgment, bond, and simple contract, in great sums of money, died intestate, seised in fee among other things of the trust of an advowson in gross.

Tong v.
Robinson,
1 Bro. Parl.
Ca. 114.
3 Vin. Ab.
144.

The question was whether this advowson was affets, and Lord Chancellor *King* decreed that it was, and should be sold for payment of the debts of *John Tong*. Upon an appeal from this decree to the House of Lords, it was insisted that the advowson was not affets at law, or liable to the demands of any of the creditors of *John Tong*, because at law no inheritance is liable to any execution, that is not capable of raising some profits towards satisfaction of the debt, which an advowson is not.

On the other side it was contended that at common law an advowson in fee is an hereditament descendible to the heir, valuable in itself, and saleable; and even capable if necessary of having an annual value put upon it, and is therefore legal affets in the hands of the

heir;

heir. The decree was affirmed with the concurrence of all the judges present.

Westfaling v.
Westfaling,
3 Atk. 460.

§ 40. In a case before Lord *Hardwicke* in 1746, one of the questions was, whether an advowson in gross was affets by descent. His Lordship observed, it had been said the authorities went no farther than where there had been a trust of an advowson, and did not extend to a legal interest in an advowson. But that this argument was quite cut up by the roots by the determination of the House of Lords in the case of *Tong v. Robinson*.

In the minute-book of that day, it was taken down, that the question proposed to be asked of the judges was, whether an advowson in fee was affets; it must have been defectively taken by the clerk, for the question intended was, whether an advowson in fee in gross was affets: for there could be no doubt as to an advowson appendant to a manor, because the manor itself being affets, what is appendant must be affets likewise. His Lordship decreed that it was affets by descent to satisfy specialty debts.

TITLE XXI.

ADVOWSON.

CHAP. II.

Of Presentation, Institution, and Induction.

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| <p>§ 1. <i>Presentation.</i>
 5. <i>Examination of the Clerk.</i>
 10. <i>Admission.</i>
 11. <i>Institution.</i>
 13. <i>Induction.</i>
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 22. <i>Who may present.</i>
 29. <i>Joint-tenants.</i>
 31. <i>Coparceners.</i>
 35. <i>Tenants in Common.</i></p> | <p>§ 37. <i>Effect of Partition.</i>
 39. <i>Mortgagor may nominate.</i>
 42. <i>And also a Bankrupt.</i>
 43. <i>An Infant may present.</i>
 47. <i>But not a Lunatic.</i>
 48. <i>Who are disabled from presenting.</i>
 51. <i>Of Simony.</i>
 75. <i>Of Bonds of Resignation.</i></p> |
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Section I.

THE essence of an advowson consisting in the right of presentation, it will be necessary to examine into the nature of this act, the time within which it must be done, and the persons who are capable of performing it.

Presentation is an offering of a clerk, by the patron or proprietor of an advowson to the ordinary; and this might formerly have been done, either by word, or by writing, but since the statute of frauds it is necessary that all presentations be in writing.

§ 2. A presentation in writing is a kind of letter, not a deed, from the patron to the bishop of the diocese,

Presentation.

1 Inst. 120 a.

1 Burn's Eccl. Law, 134.

diocese, in which the living is situated, requesting the bishop to admit the person presented to the church.

Rogers v.
Hollid,
2 Black. Rep.
1040.

§ 3. A presentation though duly made in all respects may be revoked or varied. This was always held with respect to the king, but was doubted as to lay patrons. It appears however to be now settled that a lay patron may revoke his presentation at any time, and Sir *William Blackstone* has observed that a presentation was certainly revocable by the principles of the common law, because it vested no right in any one, not even in the clerk presented; for if the clerk had a right, the law would give him a remedy to recover it when invaded. But there is no species of common law action open or competent to a clerk, to recover a presentation when obstructed, but to the patron only.

1 Bro. Parl.
Ca. 117.

§ 4. In the case in which this doctrine was laid down it was determined by the House of Lords that the instrument by which a presentation was revoked, was not in law a good revocation.

Examination
of the Clerk.

§ 5. The right of presentation is but a limited trust, and the bishops are still, in law, the judges of the qualifications of those who are presented to them. For patrons never had the absolute disposal of their churches upon their own terms, but if they did not present fit persons within the limited time, the care of appointing a proper person to fill up the vacant benefice returned to the bishop.

§ 6. The

§ 6. The law requires that the person presented be *Idonea Persona*, various exceptions may therefore be made to the character and qualifications of the person presented, 1st. Concerning his person if he be under age or a lay man. 2d. Concerning his conversation if it be irregular or criminal, and 3d. Concerning his inability to discharge his pastoral duty. And the examination of his ability and sufficiency belongs to the bishop, as the proper ecclesiastical judge; who may and ought to refuse the person presented, if he be not *Idonea Persona*. 2. Inst. 631.

§ 7. When the bishop refuses without good cause, or unduly delays to admit and institute a clerk to the church, to which he is presented, the clerk may have his remedy against the bishop, in the Ecclesiastical Court. Idem.

§ 8. If the patron finds himself aggrieved by the ordinary's refusal of his clerk, he may have his remedy by writ of *quare impedit*, in the temporal Court, and in such case the ordinary must shew the cause of his refusal, specially and directly, not only that he is a schismatic or a heretic, for instance, but also the particular schismatical or heretical opinions with which he is charged, must be set forth: For the examination of the bishop doth not finally conclude the plaintiff, and without shewing specially, the court cannot enquire and resolve whether the refusal be just or not, and if the cause of refusal be spiritual, the court shall write to the metropolitan to certify thereof, or if the cause be temporal, and sufficient in law, which the temporal

Court shall decide; the same may be traversed, and an issue thereupon joined and tried by a jury.

Episc. Exeter
v. Hele, Show.
Parl. Ca. 88.

§ 9. It has been determined by the House of Lords that it was a good plea on the part of a bishop, in a *quare impedit*, that the presentee was a person not sufficient or capable in learning to have the said church; and that the bishop need not set forth, in what kinds of learning, or to what degree, he was defective.

Admission.
1 Inst. 344 a.
Watf. 155.

§ 10. Admission is nothing else but the ordinary's declaration that he approves of the presentee, as a fit person to serve the church, to which he is presented.

Institution.
1 Inst. 344 a.
Watf. 155.

§ 11. Institution is the commitment to the clerk of the cure of souls. The form and manner of it is thus; the clerk kneels before the ordinary whilst he reads the words of the institution out of a written instrument drawn for this purpose, with the episcopal seal appendant, which he holds in his hand during the ceremony.

Watf. 156.

§ 12. The act of presentation only gives the clerk a right *ad Rem*. But institution gives him a right *in Re*, and therefore the clerk, when instituted, may enter into the glebe, and take the tithes, though he cannot yet sue for them.

Induction.
Watf. 155.

§ 13. After institution given, the ordinary issues a mandate for induction, directed to the person who hath power to induct; of common right, this person is

the archdeacon, but by prescription or composition, others as well as archdeacons may induct.

§ 14. The induction is to be made according to the tenor and language of the mandate, by vesting the incumbent with full possession of all the profits belonging to the church. Accordingly the person who inducts usually takes the clerk by the hand, and lays it upon the ring of the church door, or if the church is in ruins, then upon any part of the wall of the church or church yard, and saith to this effect—"By virtue of this mandate I do induct you into the real actual and corporal possession of the church of C. with all the rights profits and appurtenances thereunto belonging." After which the inductor opens the door and puts the person inducted into the church; who usually tolls a bell to make his induction public, and known to the parishioners; which being done, the clergyman who has inducted the clerk, indorses a certificate of his induction on the mandate, which is witnessed by the persons present.

1 Burn's Ec.
Law 156.

§ 15. Presentation must be made within six calendar months after the death of the last incumbent; otherwise the right of presentation accrues to the ordinary; and this species of forfeiture is called a lapse: It being for the interest of religion and the good of the public, that the church should be provided with an officiating minister. The law has therefore given this right of lapse in order to quicken the patron, who might otherwise by suffering the church to become vacant, avoid

Of Lapse.

paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors.

Watt. 109.
2 Inst. 361.

§ 16. As, the computation of time concerns the church, it is therefore made according to the rules of the canon law, that is, by the calendar for one half year, not counting twenty-eight days to a month; and the day on which the church becomes void, is not to be taken in the account.

2 Burn's Ec.
Law 327.

§ 17. As to the time from which the six months are to commence, the rule of the canon law in all cases was, that the six months should be reckoned, not from the time of the voidance, but from the time when the patron had notice of the voidance. As if the incumbent dies beyond sea, the six months shall not be counted from the time of his death, but from the time of the patron's knowledge thereof.

Id. 328.

§ 18. Where a clerk is refused for want of learning, or on account of his morals, the patron ought to have notice, that he may present another in due time. Yet if he neglects to do so, the lapse shall incur, from the death or cession of the former incumbent, and not from the time of notice.

Id. 329.

§ 19. It has also been held, that although no lapse shall incur, if no notice be given, yet if in such case a stranger presents, and his clerk is instituted, and inducted; and the patron gives no disturbance within six months, he has no remedy for that turn, because
induction

induction is a notorious act, of which he is bound to take notice.

§ 20. If the clerk be not refused, but the bishop only delays the examination of him, whereby the six months pass, no lapse shall incur : because the church remains void by the bishop's own fault, and he is thereby a disturber. Id. 329.

§ 21. After a church has lapsed to the immediate ordinary, if the patron presents before the ordinary has filled the church, the ordinary ought to receive his clerk. For lapse to the ordinary is only an opportunity of filling a trust, viz. of appointing a proper person to supply the living, in case of the patron's neglect, which being performed by the patron himself, the ordinary can then derive no advantage from it. Watf. 115.

§ 22. All those who are sole seised in fee, in tail, or for life ; or possessed for a term of years of a manor, to which an advowson is appendant ; or of an advowson in gross, may present to the church whenever it becomes vacant. Who may present.

§ 23. Where a person is seised or intitled to an advowson in right of his wife, he must present in his own name and that of his wife, and not in his own name only, in right of his wife.

§ 24. Where a lessee for life of a manor to which an advowson is appendant aliens the manor in fee, and after the church becomes void, the lessor may present 2 Roll. Ab. 351.

Id. 352.

before entry. But if tenant for life of an advowson in gross levies a fine *come ceo*, &c. and the church becomes void, the lessee shall present, because the reversioner did not make his election to take advantage of the forfeiture, and the present presentment being a chattel interest vested in the lessee, it could not be divested by the presentment of the person in reversion.

Ch. 1.

§ 25. It has been stated that a man may be tenant by the curtesy and a woman tenant in dower of an advowson; in which case they may of course present to the church.

Watf. ch. 9.
1 Inst. 388 a.

§ 26. Where a person is seised in fee of an advowson and the church becomes void in his lifetime; if he dies before he has presented, the right of presentation devolves to his executors, because it is considered as a chattel real.

Watf. 76.

§ 27. But if the incumbent of a church be also seised in fee of the advowson of the same church and die, the right to present will devolve on his heir, and not his executor. For the avoidance and descent to the heir happening at the same instant, the title of the heir shall be preferred, as the most ancient and worthy.

Smithley v.
Cholmley,
Dyer 135 a.

§ 28. Where a person has a grant of the next presentation only to a church, such right is considered as a chattel real, which if not disposed of, will vest in his executors.

§ 29. An advowson may be held in joint-tenancy, in which case all the joint-tenants must concur in the presentation, and where an advowson is vested in trustees under the usual words of limitation, they are joint-tenants: and therefore upon any avoidance must all join in presenting a clerk.

Joint-tenants.
1 Inst. 186 b.

Wilson v.
Kirkshaw,
1 Ves. 413.
7 Bro. Parl.
Ca. 296.

§ 30. Lord Coke says that if there be two joint-tenants of an advowson, and one presents without the other, this is no usurpation upon his companion: But if the joint-tenant who presented dies, it shall serve for a title in a *quare impedit* brought by the survivor. And if one joint-tenant presents, or if they present severally, the ordinary may either admit, or refuse to admit such a presentee, unless they joined in presentation. And after the six months, he may in that case present by lapse.

1 Inst. 186 b.
2 — 365.

§ 31. By the common law, where an advowson descends to coparceners, and they cannot agree to present, the eldest sister shall have the first turn, the second shall have the next turn, and so of the rest, according to their seniority. And this privilege extends not only to their heirs, but to the several assignees of every coparcener; whether they acquire the estate by conveyance, or by act in law, as tenant by the curtesy; who shall have the same privilege by presenting in turn, as the sisters had.

Coparceners.
1 Inst. 166 b.
2 Inst. 365.

Plowd. 333.

§ 32. The estate of an advowson descended to two daughters as parceners. The church became vacant twice in their time, and both joined in presentation.

Buller v.
Episc. Exeter,
1 Ves. 340.

The eldest married settled her estate in the common way and died. A vacancy happening, the husband of the eldest intitled to her estate as tenant by the curtesy or under the settlement claimed to present.

The question was whether the alternate turn of presentation among coparceners continued to the grantee, that is, whether the persons to whom it was conveyed, were to be considered as enjoying the same privileges, of presenting in turn, as the sisters and parceners, if they had their own estate. Mr. Baron *Clark* was clearly of opinion upon the authority of the passage in 2 *Inst.* 365. above stated that the husband of the eldest sister was entitled to the presentation.

Willes Rep.
659.

The doctrine here laid down has been fully recognized by the Court of Common Pleas in the case of *Barker v. Lomax*, as reported by Lord Chief Justice *Willes*.

Idem.

§ 33. Although coparceners make composition to present by turns, this being no more than the law doth appoint, *expressio eorum que tacite insunt nihil operatur*; therefore they remain coparceners of the advowson, the inheritance of which is not divided.

§ 34. By the statute *Westminster 2. c. 5.* it is provided, that where an advowson descends to coparceners, though one presents twice, and thereby usurps upon his co-heir, yet he that was negligent shall not be barred, but another time shall have his turn to present when it falleth.

§ 35. Tenants in common of an advowson must also join in presenting to the church, and, therefore, if they present severally, the ordinary may either admit or refuse the clerk; and after six months he may present by lapse.

Tenants in
Common.

§ 36. If one tenant in common of an advowson presents alone, this will not put the other out of possession; for at the next avoidance, they may join in presentation.

2 Roll. Ab.
372.

§ 37. It was held by Lord *Holt*, that joint-tenants of an advowson might make partition to present by turns, which would divide the inheritance *aliquatenus*, and create separate rights, so that the one shall present in the one turn, and the other in the other, which is a sufficient partition. For partition of the profits is a partition of the thing, where the thing and the profits are the same. It could not make two advowsons out of one, but it could create distinct rights to present in the several turns.

Effect of Par-
tition.

Epif. Salif-
bury v. Philips,
1 Ld. Raym.
535.

§ 38. By the statute 7 *Ann.* c. 18. it is enacted,
“ That if coparceners or joint-tenants, or tenants in
“ common, be seised of any estate of inheritance in
“ the advowson of any church or vicarage or other
“ ecclesiastical promotion, and a partition is or shall
“ be made between them to present by turns, that
“ thereupon every one shall be taken and adjudged to
“ be seised of his or her separate part of the advowson
“ to present in his or her turn: as, if there be two,
“ and they make such partition, each shall be said to
“ be

“ be seised, the one of the one moiety to present in
 “ the first turn, the other of the other moiety to pre-
 “ sent in the second turn : in like manner, if there be
 “ three, four, or more, every one shall be said to be
 “ seised of his or her part, and to present in his or her
 “ turn.”

A Mortgagor
 may nomi-
 nate.

Gally v.
 Selby,
 Com. R. 343.

§ 39. Though a person has mortgaged an advowson by which the legal right to present becomes vested in the mortgagee, yet such mortgagee cannot present ; whether the advowson be appendant or in gross : for, since the presentation is gratuitous, and the mortgagee cannot account for any benefit from it, a court of equity will compel the mortgagee to present the nominee of the mortgagor.

Mackenzie v.
 Robinson,
 3 Atk. 559.

§ 40. A petition was presented on behalf of a mortgagor, that the mortgagee of a naked advowson might accept of his nominee, and present him upon an avoidance, the incumbent being dead.

It was insisted for the mortgagee, that as there was a large arrear of interest, he ought to present, if any advantage accrued from it : and cited the case of *Gardener v. Griffith*, 2 P. Wms. 404., where the plaintiff's father being possessed of a 99 years term of the advowson of *Eckington*, made a mortgage thereof to the defendant, and in the mortgage deed was a covenant, that on every avoidance of the church, the mortgagee should present. The court gave no opinion, but seemed to incline that the mortgagee had a right to present.

Lord

Lord *Hardwicke* was of opinion, that the mortgagor ought to nominate, and that it was not presumed any pecuniary advantage was made of a presentation. His Lordship observed, that these were indifferent securities, but the mortgagee should have considered it before he lent his money; and, instead of bringing a bill of foreclosure, as he had done in this case, should have prayed a sale of the advowion.

The next day, his Lordship mentioned, that he was not clear as to this point, and that he had looked into the case of *Gardiner v. Griffith*, according to the state of it in the House of Lords, where the decree of Lord Chancellor *King* was affirmed: and said, that was a mixed case; and that he doubted himself whether a covenant that the mortgagee should present (as was the case there) was not void, being a stipulation for something more than the principal and interest, and the mortgagee could not account for the presentation.

The question was adjourned for further consideration to the next day of petitions, when the mortgagee, not being able to find any precedent in his favour, gave up the point of presenting: and an order was made, that the mortgagor should be at liberty to present, and the mortgagee was obliged to accept of the mortgagor's nominee.

§ 41. It appears to have been formerly held, that where a manor to which an advowson was appendant, was extended on a statute merchant, if the church became void during the cognizee's estate, the cognizee might

Arundel v.
Epil. Gloucester.
Owen 49.

might present. But it is to be presumed, that if a case of this kind were now to arise, the cognizor would be allowed to nominate a clerk to the cognizee, by analogy to the case of a mortgagor.

And also a
Bankrupt.
Watf. 106.

§ 42. It has been held upon the same principle, that if a patron is a bankrupt, and the church becomes void before the commissioners or assignees have sold the advowson, the bankrupt shall present.

An Infant
may present.
3 Inst. 156.
2 Inst. 89 a.

§ 43. Lord *Coke* says, that a guardian in socage of an infant seised of a manor, to which an advowson is appendant, shall not present to the church, because he can take nothing for the presentation for which he may account to the heir; and therefore the heir, in that case, shall present, of what age soever.

3 Atk. 710.

§ 44. This doctrine is now fully established; and Lord *Hardwicke* has observed, that the strong ground the law goes on, is, that there can be no inconvenience, because the bishop is to judge of the qualifications of the clerk presented, and in the following case it was determined that an infant, who was not a year old, might nominate or present to a living.

Arthington v.
Coverley,
2 Ab. Eq. 518.

§ 45. *Cyril Arthington* conveyed an advowson to trustees, upon trust to present such a son of a particular person, as should be capable of taking the same, when the church became void; and if that person had no son qualified to take the living at that time, in trust to present such person as the grantor his heirs or assigns should appoint, and in default of such nomination by
the

the grantor and his assigns, that the trustees should present a person of their own choosing. The grantor died leaving his son and heir an infant of six months old. The living became vacant. The guardian of the infant took him in his arms, and guided his pen in making his mark, and made him seal a writing, whereby one *Hitch* was nominated and appointed to the trustees, in order to be presented by them to the living. The trustees supposing the plaintiff as an infant, unable to make such an appointment, refused to present Mr. *Hitch*, and presented another person. Upon which the infant brought his bill against the trustees to have them execute their trust, in presenting his nominee. It was argued for the defendants that the presentation of clerks to bishops for admission to churches was an act that required judgment and discretion, which an infant was not master of; and though the law suffered them to present to their own livings, yet it was of necessity, because there was no body else to do it, and if they could not, then a lapse must incur: For a presentation to a living being a thing of no value, and therefore not to be accounted for, a guardian could not have it, whereas in the present case if the grantor or his heirs neglected or were incapable of presenting, the trustees were expressly authorized to present, whose act would be considered as the act of the infant, so that no injury would be done to any body. And though in cases of evident necessity, equity might square itself by law, yet where no such necessity appeared, reason and common sense ought to prevail; from whence it was inferred that the nomination being an act requiring

ing discretion and judgment was void ; and the trustees intitled to present their own clerk.

On the other side it was contended that in the case of presentation, as an infant just born might present at law, so the law did not look on it as an act which required discretion in the patron ; nor indeed was it requisite, for infants being supposed to follow the directions of their guardians, might be informed by them, who was a proper person, or if they were not, yet a presentation being only a bare recommendation of a clerk to a bishop, and not an act which gave any interest in the living ; and the bishop being absolute judge of the person's abilities, there did not appear any great reason why an infant might not make it as well as a person of full age ; and it was not of necessity that they must present, for though a lapse might incur, yet the presentation of the minor on the next vacancy was reserved, and nothing divested out of him by the bishop's collation ; so that as to the infant, it was the same whether the bishop collated, or the trustees presented ; wherefore they inferred equity ought to be bound to the law, since the case and reason of the thing was alike, for otherwise the greatest confusion and uncertainty would follow.

Lord Chancellor *King* said—" An infant of one or
 " two years old may present at law ; then why may
 " they not nominate ? Does the putting a mark and
 " seal to a nomination require more discretion than to
 " a presentation ? The guardian is supposed to find a
 " fit person ; and the bishop to confirm his choice.
 " And

“ And if this is permitted at law, why should a court
“ of equity act otherwise in equitable estates? Decree
“ for the plaintiff.”

§ 46. Mr. *Hargrave* has observed that though this decision may remove all doubts about the legal right of an infant of the most tender age to present, still it remains to be seen, whether the want of discretion would induce a court of equity to control the exercise, where a presentation was obtained from an infant, without the concurrence of the guardian.

1 Inst. 89 a.
n. 1.

§ 47. A lunatic cannot however present to a church, nor his committee: for where a lunatic is seised of an advowson, the Chancellor, by virtue of the general authority delegated to him, presents to the preferment whatever be the value of it, generally however giving it to one of the family. This right (says Mr. *Woodeson*) was asserted first by Lord *Talbot*, whose example was followed by his immediate and other successors.

But not a
Lunatic.

1 Woodd.
Lect. 409.

§ 48. An alien is disabled from presenting to a church, and therefore if an alien purchases an advowson, and the church becomes void, the king shall present.

Who are disabled from
presenting.
Watf. 106.

§ 49. Where a person seised of an advowson is outlawed, and the church becomes vacant while the outlawry remains in force, he is disabled from presenting and the avoidance is forfeited to the king.

Watf. 105.

§ 50. By

§ 50. By the statute 3 *James* 1. c. 5. it is enacted, that all popish recusants convict shall be disabled to present to any benefice, or to grant any avoidance to any benefice, and the presentation to such benefices is given to the universities of *Oxford* and *Cambridge*. And by the statute 1 *Wm. & Mary*, sess. 1. c. 26. every person who shall refuse or neglect to subscribe the declaration mentioned in an act of that parliament, intituled, “An act for the better securing the government “by disarming papists and reputed papists,” shall be disabled to make any presentation to a benefice, as fully as if such a person were a popish recusant convict, and the chancellor and scholars of the universities of *Oxford* and *Cambridge* shall have such presentations.

The trustees of popish recusants convict are also disabled by this act from presenting to a benefice.

Of Simony.

§ 51. As it is of the utmost importance to the public that ecclesiastical offices should be conferred on those only whose learning and piety qualifies them for the duties annexed to such offices, the law has always been extremely careful in watching over those who have a right of presentation to church livings, lest they should be influenced in the exercise of this right by any corrupt or improper motives. It has therefore been established from the earliest times that no pecuniary or other valuable consideration ought in any instance to be given or received for procuring a presentation to a church. This offence is called Simony in the canon law; the person making a corrupt contract of this kind is called *Simoniacus*. And where a person thus

1 Inst 17 b.
89 a.

3 Inst. 153.

presented to a church is not privy to the simony, he is said to be *Simoniace promotus*.

§ 52. By the statute 31 *Eliz.* c. 6. it is enacted for avoiding of simony, that if any patron for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, shall present or collate any person to an ecclesiastical benefit or dignity; such presentation shall be void; and the presentee be rendered incapable of ever enjoying the same benefice, and the crown shall present to it, for that time only.

§ 53. It was formerly held that if a person who had acquired a benefice by simony enjoyed it during his life, the king might present after his death, because the church notwithstanding the institution and induction of the simonist, remained void to the king's presentation, before his death, and his death could not make him incumbent, that was none before, or otherwise alter the case. But now by the statute 1 *Wm. & Mary*, ch. 16. it is enacted that if a person simoniacally presented, shall die without being convicted of such simony in his lifetime, such simoniacal contract shall not prejudice any innocent patron or clerk, on pretence of lapse to the crown, or otherwise. Watf. 96.

§ 54. The first kind of simony under the statute is, where any sum of money, gift, reward, profit, or benefit, is given, or promised, directly or indirectly, for procuring a presentation to a benefice.

Watf. 43.

§ 55. If a clerk seeks to obtain for money a presentation to a void church, though afterwards the patron presents him gratis, yet this simoniacal attempt has disabled him from taking the benefice, the clerk being deemed an unfit person to hold the benefice, for having at any time been capable of intending to obtain it corruptly.

Watf. 37.

§ 56. If a patron promises a clerk that in consideration of his marrying his daughter or kinswoman he will present him to a living when void, this is a simoniacal contract.

Byrte v.
Manning,
Cro. Car. 191.

§ 57. But where *A.* covenanted that *B.* his son should marry *C.* the daughter of *D.* in consideration of which *D.* covenanted to advance £300 for his daughter's portion, and *A.* covenanted to settle certain lands on his son and his intended wife. There were likewise covenants on the part of *A.* for the value of the lands, and for quiet enjoyment, and a covenant on the part of *D.* to procure a certain benefice for *B.* on the next avoidance. It was held that this was not a corrupt contract, it not being a covenant in consideration of the marriage, but a distinct and independent covenant, without any apparent consideration.

Baker v.
Mounford,
Noy 142.

§ 58. A reservation of a profit to a stranger, as an annuity to the widow or son of the last incumbent does not appear to have been an offence within the statute of 31 *Eliz.* though, Doctor *Watson* doubts of it. But it is perfectly clear that a reservation of any kind of profit, in favour of the patron is within the statute.

§ 59. A corrupt

§ 59. A corrupt contract for procuring a presentation to a benefice made between strangers, though neither the patron nor the clerk be privy thereto, is an offence within the meaning of the statute. For if there be a corrupt contract, it matters not between whom it is made. But in such a case though the clerk is *Simoniace promotus*, yet he does not incur any of the penalties of simony.

Watf. 45, 46.
3 Inst. 154.
12 Rep. 73.
Cro. Eliz.
789.

§ 60. In a writ of error to reverse a judgment whereby the king had recovered upon a title of simony; which was, that a friend of the clerk had agreed to give a sum of money to J. S. who was not the patron, to procure the clerk to be presented to a church, who was presented accordingly. It was assigned for error that it did not appear that either patron or clerk were acquainted with the agreement. But the court said the clerk was *Simoniace promotus*. And it was said, that Doctor Duxon had enjoyed the church of *St. Clement's* above twenty years by such a title of the king's, the presentee of the patron being ousted, by reason of a friend's having given money to a page of the Earl of *Exeter*, to endeavour to procure the presentation, and neither the earl nor the clerk knew any thing of it.

Rex v.
Truffel,
1 Sid. 329.
2 Keb. 204.

§ 61. The second kind of simony is where the right of presenting is sold at the time when the church is vacant; which was formerly held to be void, because during the vacancy of the church the right of presentation was but a chose in action, which could not be transferred.

Jenk. Cent. b.
Ca. 13.

Stephens v.
Wall, Dyer
282 b.

§ 62. A patron of an advowson, the church being void, granted to *B. proximam presentationem* to the said church *jam vacantem ita quod liceat B. hac vice ad dictam ecclesiam presentare.*

It was resolved by all the judges of *England* that this grant was void, for the present avoidance was a thing in action and privity, and vested in the person of the grantor.

3 Burr. R.
1512.

§ 63. The true reason of this resolution was to guard against simony; for the purchaser can have no other object, but that of presenting himself, or some other person. And in a modern case Lord *Mansfield* and Mr. Justice *Wilmot* both said that the true reason why a grant of a fallen presentation of an advowson, after avoidance is not good, *quoad* the fallen vacancy, is the public utility, and the better to guard against simony: not for the fictitious reason of its being then become a *chose in action*.

Benloe R.
192.

§ 64. A lease of an advowson, granted after the church became vacant, was adjudged void, as to the immediate presentation.

Amb. R. 268.

And Lord *Hardwicke* is reported to have said that the sale of an advowson during a vacancy was not within the statutes of simony, as a sale of the next presentation was; but it was void by the common law.

Walker v.
Hannumfly,
Skinn. 60.

§ 65. If a presentation be made by a person usurping the right of patronage, and pending an action for removing

removing his clerk, who is afterwards removed, the benefice is sold, this is an offence within the meaning of the statute, for the church was never full of that clerk; and if this were allowed, the statute might be eluded: for it would be only getting an usurper to present, while the church was void, and then selling it.

§ 66. A grant of a presentation after institution of the incumbent to a second living, which vacates the first, is void because the church is considered as vacant from the time of institution.

Ep. London v.
Wolverstan,
1 Black. R.
490.

§ 67. Where a person purchases the next presentation to a benefice, the church being then full, with an intention to present a certain person, a subsequent presentation of that person has been generally considered as simony.

Smith v.
Sherborne,
Cro. Eliz.
685.

§ 68. A distinction has however been made in cases of this kind between the presentation of a stranger, and that of a son of the person purchasing the next presentation. In the latter case it has been held not to be simony; because a father is bound by nature to provide for his son. This distinction has however been denied, and it has been said, that if the purchase of a living when full, with intent to present a certain person, be an offence within the meaning of the statute, how can it be lawful, as the words of the statute are general, for a father to do this? A parent is by nature certainly bound to provide for his son, but this obligation can never extend to the doing of a thing prohibited by law. This way of reasoning would open a

Watf. 35.

Bac. Ab. 8vo.
v. 6. 188.

wide door for corrupt contracts; for as every man is more bound by the law of nature to provide for himself, than a father is to provide for his son, every man might purchase a living for himself.

Wall. 36.

§ 69. Doctor *Watson* says that to avoid questions of law it is best that a purchaser of a next turn, whether he design it for son, kinsman or stranger, should make the contract when the incumbent of the church is not in danger of death; that he should not declare his intentions to the person to whom he intends a kindness, or whom he intendeth to present; that the intended clerk be not present at the contract, however that he be not named in the deed, by which the power of presentation or nomination is granted.

§ 70. It is now the universal practice to purchase the next presentation to an advowson, the church being full, and there is no modern instance where a presentation under such a purchase has been controverted by the bishops.

Hob. 156.
Cro. Eliz.
685.
Winch 63.

§ 71. It has been several times laid down that a purchase of the next presentation to a church, when the incumbent is in a dying state, is simony. But it has been determined in a modern case that a purchase of an advowson in fee, when the incumbent was near dying, was not simony.

Barrett v.
Glubb,
2 Black. R.
1052.

§ 72. The plaintiff *Barrett* having notice that the incumbent of a living, was on his death bed, and that it was uncertain whether he would live over the night, purchased the advowson of the defendant. The incumbent

incumbent died the next day, and the purchaser presented his clerk upon that avoidance.

The question, which was referred by the Court of chancery to the court of common pleas, was, whether the said presentation was void, as being a simoniacal contract.

Serjeant *Hill* argued for the plaintiff that this was no simony, being the sale of an advowson in fee, and before an actual vacancy. That simony is properly defined, a presentation in respect of reward. That the statutes of simony being penal, and restrictive of the common law, ought therefore to be construed strictly. That fraud or simony ought not to be presumed or intended. If this sale was void, all sales that were concluded when the incumbent was *in extremis*, were so likewise; and one might suppose many cases where that would be unjust and absurd.

Serjeant *Glyn* for the defendants insisted that the common law, previous to any statute, took notice of corrupt presentations, as contracts *ex turpi causa*. That no profit was allowed to be made of a right of patronage, and therefore a guardian in socage was not accountable for it. That a purchase made with an intent to present a particular person was simoniacal. And the laws against simony when they merely vacated the presentation, were considered as remedial, and construed largely. When they inflicted a forfeiture, were looked upon as penal, and construed strictly.

Ante, f. 39.

Lord Ch. Just. *De Grey* said he was not able to doubt upon the question. An advowson was a temporal right, not indeed *jus habendi*, but *jus disponendi*, the exercise of that right was by presentation. The right itself was a valuable right, and therefore an advowson was held to be assets in case of lineal warranty. It was real assets in the hands of the heir; and the trustee or mortgagee of an advowson was bound to present the clerk of the *cestuique* trust or mortgagor. Thus far it was a valuable right and properly the object of sale.

Ante, f. 43.

But the exercise of this right was a public trust, and therefore ought to be void of any pecuniary consideration, either in the patron or the presentee: it could not, it ought not to produce any profit. It was not vested in a guardian in socage, nor was he accountable for any presentation made during the infancy of his ward.

Simony as such was unknown to the common law, though corrupt presentation was. But what was, or was not simony now depended on the statute 31 *Eliz.* which did not adopt all the wild notions of the canon law, but had defined it to be, a corrupt agreement to present.

No conveyance of an advowson can be affected by that act, unless so far as it affected the immediate presentation. And therefore a sale of an advowson, the church being actually void, was simoniacal and void in respect to the then present vacancy.

But it has never been thought that to purchase an advowson merely with the prospect (however probable)
that

that the church would soon become void, was either corrupt or simoniacal, though by common law if a clerk, or a stranger with the privity of the clerk contracts for the next avoidance, the incumbent being *in extremis*, it was held to be simoniacal.

The present case is the purchase of an advowson in fee. No privity of the clerk appears. The church was not actually void, but in great probability of a vacancy, which however was by no means equivalent to a certainty. His Lordship said that the judges would go beyond every resolution of their predecessors, to determine this to be simony. Suppose this had been the purchase of a manor, with the advowson appendant, and the incumbent lying *in extremis*; what must be done if the present case was simony? Must the court have declared the appendancy to be severed, or that the whole manor was purchased corruptly, for the sake of the advowson? The other judges concurred and the court certified to chancery that the presentation was not void, it not appearing to them to have been made upon a simoniacal contract.

§ 73. By the statute 12 *Ann.* p. 2. c. 12. it is enacted, that if any person for money or profit shall procure in his own name, or in the name of any other, the next presentation to a living ecclesiastical and shall be presented thereupon, this is declared to be a simoniacal contract, and the party is subjected to all the ecclesiastical penalties of simony.

Cases and
Opinions 409.

Ante § 72.

§ 74. It has been doubted whether the purchase of an advowson in fee by a clergyman and a presentation of himself upon the death of the incumbent be within this statute. It appears from an opinion of the late Mr. *Fearne* that he did not think such a purchase was prohibited by that statute; and that a presentation by a trustee of such a purchaser, of the purchaser himself might be made. This opinion is supported by Lord Chief Just. *De Grey's* argument in the case of *Barrett v. Glubb*, in which his Lordship distinguished between a purchase of the next presentation to a church and a purchase of an advowson in fee. For in the first case he admitted that a purchase would be Simoniacal if the incumbent was *in extremis*, whereas in the second case he held it good.

Of Bonds of
Resignation.

§ 75. It has been a common practice for patrons when they present a clerk to a living, to take a bond from him in a sum of money conditioned, either to resign the living in favour of a particular person, as a son, kinsman, or friend of the patron, whenever he becomes capable of taking the living; or else to resign generally upon the request of the patron.

Watf. 39.
Johns v.
Lawrence,
Cro. Jac. 248.
Babington v.
Wood,
Cro. Car. 180.

Hilliard v.
Stapleton,
1 Ab. Eq. 86.

In the first case these are called special bonds of resignation and have always been held to be valid. In the second case they are called general bonds of resignation, and were never approved of by the bishops, though held to be valid by the courts of law and equity. But whenever they were used for the purpose of obtaining any pecuniary advantage from the person presented,

sented, the court of chancery always interposed, and granted an injunction against them. And Doctor *Watson* observes that general bonds of resignation did not find any encouragement from the court of chancery, which relieved the incumbent, and would not oblige him to resign, or to pay the penalty of the bond, unless some special cause were shewn, and made out by the patron, that he was unqualified to hold the living, or guilty of some immorality or irregularity, which was a sufficient cause of deprivation; or at least that he was non-resident and neglected his duty. But in the following case it was determined by the House of Lords that where a clerk, upon being presented to a living, entered into a general bond to the patron, to resign whenever the patron should require him, such bond was absolutely void. Id.

§ 76. The rectory of the parish church of *Woodham Walton*, in the diocese of *London* becoming vacant, Mr. *Fytche*, the patron, presented his clerk, the Rev. Mr. *Eyre*, to the bishop for institution. The bishop being informed, that Mr. *Eyre* had given his patron a bond in a large penalty to resign the said rectory at any time upon his request; and Mr. *Eyre* acknowledging that he had given such a bond, the bishop refused to institute him to the living. Mr. *Fytche* brought a *quare impedit* against the bishop, to which he pleaded two pleas: first, that the living was a benefice with cure of souls, and that the clerk had given a bond to the patron in the penalty of £3000, to resign at any time upon the request of the patron, whereby the presentation became void in law. Secondly, that the living was a benefice

Ep. London
v. Fytche,
2 Bro. Parl.
Ca. 211.

benefice with cure of souls ; and that, for the purpose of investing the patron with an undue influence over the clerk, it was agreed that the clerk should, in consideration of the presentation, become bound to the patron in a bond as aforesaid ; which was accordingly done. Mr. *Fytche* demurred to both those pleas ; and, the bishop having joined in demurrer, judgment was given for the patron : and the judgment was affirmed by the court of king's bench.

The bishop then brought a writ of error in the House of Lords ; and it was contended on his part, that,
 “ although there are several adjudged cases upon the
 “ subject of general bonds of resignation, none of them
 “ have arisen in the same form, or between parties
 “ acting in the same capacity, and under circumstances
 “ similar to the present ; and, therefore, they ought
 “ not to be considered as precedents, by which this
 “ case was to be determined. That the bishop, or
 “ ordinary, is authorized by law to judge, in the first
 “ instance, of the fitness or unfitness of the person
 “ presented to him for institution ; and the bishop of
 “ *London* had, in this instance, exercised his authority
 “ according to law. That it is in the power of the
 “ patron, by means of a general bond, to establish two
 “ modes of selling a vacant living, which is simony ;
 “ either of which are equally certain and infallible :
 “ 1st, The parties may make the penalty in the bond
 “ adequate to the price of the living ; the presentee,
 “ when instituted, may refuse to resign, and pay the
 “ penalty without suit, or may make known the exe-
 “ cution of the bond, and then tender resignation to
 “ the

“ the bishop, which, the bishop under those circum-
 “ stances will probably refuse : upon his refusal, the
 “ bond may be put in suit ; and thus also, by a circuitry,
 “ the penalty may be paid as the price of the living.
 “ The second mode of selling a living which is vacant,
 “ through the medium of a general bond of resigna-
 “ tion, is equally obvious and practicable : the pe-
 “ nalty of the bond of resignation may be made ex-
 “ cessive, much above the real value of the living ;
 “ the patron may, during the incumbency of the pre-
 “ sentee who executes the bond to resign, sell the next
 “ turn or right of presentation, and at an advanced
 “ price, and, after such sale, require the incumbent
 “ to resign in terms of his bond. By this means, the
 “ first presentation is fictitious ; and the sale of the
 “ second presentation, though made under the pretence
 “ of selling a right of presentation to a full benefice, is,
 “ in reality, the sale of a vacant living. That a ge-
 “ neral bond to resign, puts the person who enters into
 “ such bond under the power of the lay patron, instead
 “ of being under the authority of the bishop, to whom
 “ he swears canonical obedience, and whom, by law,
 “ he is obliged to obey ; and is thus, contrary to good
 “ policy, creating an influence which tends to subvert
 “ ecclesiastical discipline and subordination. That
 “ general bonds of resignation are contrary to law, by
 “ altering the tenure of the office of a beneficed clergy-
 “ man : for, every benefice being an office for life,
 “ the patron can grant it only for life : he cannot
 “ grant it for years ; he cannot grant it at the will of
 “ himself, for such, in direct terms, would be void,
 “ as contrary to the very tenure of the office : where
 “ there

“ there is a general bond of resignation entered into,
 “ the same alteration of the tenure is effected by
 “ circuitry too here: the patron grants, and the pre-
 “ sentee accepts, at the will of the patron, that bene-
 “ fice which the law intends to be conferred and
 “ holden for life. That, although a court of equity
 “ will grant relief, in case the patron makes an impro-
 “ per use of a general bond to resign, yet, from the
 “ extreme difficulty of discovering the real purpose for
 “ which they are used, it can seldom be possible to
 “ procure such relief, or to guard, by that means,
 “ against the consequences that follow from such bonds
 “ being tolerated. The bad purpose not being dis-
 “ covered, cannot be prevented but by a solemn de-
 “ cision, that general bonds of resignation are illegal.
 “ That a general bond of resignation puts it in a great
 “ measure in the patron’s power to convert a part of
 “ the profits of the living to his own use, and abso-
 “ lutely puts it in the power of patron and incumbent
 “ together to make such partition of them as they can
 “ agree upon, whereby the revenues of the church
 “ may be alienated. And, that a general bond of re-
 “ signation is *an assurance of profit or benefit to the*
 “ *patron*, and therefore contrary to the statute 31 *Eliz.*
 “ *c. 6.* and inconsistent with the oath of simony.”

On behalf of the defendant in error, it was said,
 “ that this was a new attempt to question the settled
 “ law of the land; namely, whether a bond, given
 “ by the presentee to the patron, with a condition to
 “ resign upon request, which is termed a general re-
 “ signation bond, simple and unattended with any
 “ other

“ other fact or circumſtance, be corrupt, ſimoni-
 “ and againſt the ſtatute of *Elizabeth*? This had
 “ been queſtioned, and repeatedly determined in *West-*
 “ *minſter Hall*, to be legal, and not ſimoni-
 “ cal. And
 “ it was looked upon to be ſo well ſettled and eſta-
 “ bliſhed, that, in *Heſketh* and *Gray*, 28 *Geo. 2.* the
 “ court would not ſuffer the counſel to argue againſt
 “ the validity of ſuch a bond. But ſuch a bond may
 “ be abuſed; it may be corrupt, ſimoni-
 “ cal, againſt the ſtatute; it may be given upon a preced-
 “ ing ſtipulation of gain, &c. or, after it is innocently
 “ given, it may be uſed by the obligee for the purpoſe
 “ of withholding tythes or deriving ſome pecuniary
 “ advantage to himſelf. And if there be only grounds
 “ to ſuſpect ſuch practices, a bill may be filed for a
 “ diſcovery; and it was admitted, that, when ſuch
 “ illegal facts are alledged and proved, ſuch a bond
 “ cannot be enforced in a court of juſtice. But the
 “ courts of juſtice never interfere with poſſibilities:
 “ they never interfere but, when ſuch abuſe appears,
 “ and is ſpecified and alledged in the pleadings, in
 “ order to be proved if denied. That the biſhop in
 “ this caſe was precisely in the ſame predicament with
 “ the clerk in all other caſes; he had the ſame advan-
 “ tage of filing a bill for a diſcovery of ſuch illegal
 “ fact, and of pleading it when he had ſo diſcovered
 “ it; and he had it in the preſent caſe.

“ But the bond in the preſent caſe was a mere
 “ ſimple reſignation bond, unattended with any ſuch
 “ illegal circumſtance; every ſuch circumſtance, ſug-
 “ geſted by a bill for a diſcovery had been denied; no
 “ ſuch

“ ſuch abuſe was ſpecified in the firſt plea ; and there-
 “ fore the cauſe, therein alledged by the biſhop, was
 “ not ſufficient for him to reſuſe the clerk. That the
 “ ſame reaſoning might be applied to the ſecond plea,
 “ the poſſible abuſe of ſuch a bond, viz. that he
 “ would have acquired and had undue influence,
 “ power, and controul over the clerk if he had admit-
 “ ted him : ſo alſo as to the unſitneſs of the clerk.
 “ But, in order for the courts to interfere, the undue
 “ influence muſt have happened ; it muſt then be ſpe-
 “ cified and alledged in the plea, in order for the
 “ court of juſtice to interfere : the unſitneſs, in like
 “ manner, muſt be ſpecified and alledged in order to
 “ be proved. But the bond, in the preſent caſe, was
 “ unattended with any ſuch circumſtance ; and there-
 “ fore neither any undue influence or unſitneſs was
 “ ſpecified in the ſecond plea, to have attended the
 “ preſentation : conſequently, the cauſe here alledged
 “ was not ſufficient for the biſhop to reſuſe the clerk.

“ And, as to the propriety of ſpecifying the unſit-
 “ neſs, it might be obſerved that the judgment of the
 “ biſhop was ſubject to review ; he cannot reſuſe *ad*
 “ *libitum* ; he muſt aſſign his cauſe of reſuſal : for
 “ every fact of unſitneſs may be queſtioned and tried
 “ in a temporal court, except literature ; and that is
 “ ſubject to the review of the metropolitan. Upon
 “ the whole, there was no fact alledged in the plead-
 “ ings of illegal uſe in giving the bond, or of undue
 “ influence or unſitneſs in the clerk to be admitted,
 “ &c. beſides the mere naked giving of the bond :
 “ wherefore it was hoped the judgment of the court of
 king’s

“ king’s bench would be affirmed.”—After hearing counsel on this case several questions were put to the judges, seven of whom were of opinion that the bond was good and valid and the eighth (Mr. Baron Eyre), that it was illegal.

After the judges had thus delivered their opinions a debate and division of the house ensued when there appearing to be, for reversing the judgment nineteen and against it eighteen. It was ordered and adjudged that the judgment given in the court of king’s bench, affirming a judgment given in the court of common pleas should be reversed.

30th May
1783.

§ 77. In consequence of this determination, general bonds of resignation must now be deemed illegal and void. But the courts of law do not seem disposed to condemn bonds of resignation unless they are exactly similar to that which was held unlawful in the above case; for, in a subsequent case, the court of king’s bench held, that a bond, by which a clerk shall only bind himself to the performance of those duties, which the rules of law and the principles of morality require, is valid, and will be enforced.

§ 78: A bond was given by a clerk to a patron, to reside on the living, or to resign if he did not return after notice; and also not to commit waste on the parsonage.

Bagshaw v.
Bosaley,
4 Term Rep.
78.

In an action of debt on this bond, the question was, whether it was valid or not.

Lord *Kenyon*,—"I cannot bring myself to entertain
 " a doubt on this case. It has been argued, that the
 " patron's right of presentation is a mere trust : it is
 " so to some purposes, but not to all. It is a trust
 " coupled with an interest : for it is a subject of con-
 " veyance for a valuable consideration, which is not
 " the case with a naked trust. As soon as the de-
 " fendant was presented to the living, he was bound
 " to take upon himself all the duties of an incum-
 " bent ; to reside on the living, to take upon him the
 " cure of souls, and to keep the house in proper
 " repair. Now, this bond was entered into for the
 " purpose of securing a performance of all those
 " duties ; which, by law and without the bond, he
 " was bound to discharge. I avoid saying any thing
 " respecting the case of the bishop of *London v. Eytche* ;
 " when that question comes again before the House of
 " Lords, they will, I have no doubt, review the
 " former decision, if it should become necessary. It
 " is sufficient for me, in deciding the present case, to
 " say that it cannot be governed by that. For here
 " the plaintiff does not call for the resignation of the
 " incumbent, but merely for a performance of those
 " duties ; which, in morality, religion, and law, he
 " ought to do. I am, therefore, clearly of opinion,
 " that a bond for the performance of these duties is
 " not illegal."

Buller J.—"I cannot find any immorality or ille-
 " gality in this bond. It is the duty of an incumbent
 " to reside on his living, and to be regular in the dis-
 " charge of his duty. Now, this bond requires
 " nothing

“ nothing more : it only requires him to do what the
 “ law would have compelled him to do without it.

Grose J.—Declared himself of the same opinion.

Judgment for the plaintiff.

§ 79. In a subsequent case, where a clerk had given a bond to the patron on his presentation, on condition to reside on the living, and to resign if the patron's son became capable and desirous of taking the living, and also to keep the rectory house and chancel in repair; the court of king's bench, in an action of debt on this bond, understanding that it was intended to carry the case up to the House of Lords, gave judgment for the plaintiff, without any argument. They said that, as this was not precisely similar to the case of the bishop of *London v. Fytche*, they were bound by the established series of precedents.

Partridge v. Whiston,
 4 Term Rep.
 359.

It does not appear, that this case was ever carried to the House of Lords.

TITLE XXII.

TITHES

- | | |
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| <p>§ 1. <i>Origin and Nature of Tithes.</i>
 4. <i>Different Kinds.</i>
 17. <i>Of what Things Predial Tithes are due.</i>
 40. <i>Agistment.</i>
 45. <i>Hemp, Flax, &c.</i>
 50. <i>Gardens.</i>
 53. <i>Of what Things mixed Tithes are due.</i>
 56. <i>Of what Things Personal Tithes are due.</i>
 58. <i>What Things are not tithable.</i>
 64. <i>To whom Tithes are due.</i>
 66. <i>Of Rectorial and Vicarial Tithes.</i></p> | <p>§ 72. <i>Of Lay Improvements.</i>
 78. <i>Long Possession of a Portion of Tithes gives a Title.</i>
 80. <i>Of Exemptions from Tithes.</i>
 81. <i>Prescription De non decimandi.</i>
 90. <i>Whether good against a Lay Improver.</i>
 95. <i>Non-payment will support a Claim to a Portion of Tithes.</i>
 98. <i>Prescription De modo decimandi.</i>
 101. <i>Real Composition.</i>
 106. <i>Inclosure Acts.</i></p> |
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Section 1.

Origin and
Nature of
Tithes.

DURING the first ages of Christianity, the clergy were supported by the voluntary offerings of their flocks; but, this being a precarious subsistence, the ecclesiastics in every country in *Europe*, in imitation of the *Jewish* law, claimed, and, in the course of time, established, a right to the tenth part of the profits of lands; which right appears to have been fully

* Nothing more than a general outline of the law respecting tithes is here attempted; and that only as far as relates to lay improvers.

admitted in *England*, before the *Norman* conquest, and acquired the name of tithe from the *Saxon* word tenth.

§ 2. Tithes may be described to be the tenth part of the produce of lands, the stock upon lands, and the personal industry of the inhabitants. They were, originally, a mere ecclesiastical revenue, ecclesiastical persons only having a capacity to take them, and ecclesiastical courts only having cognizance of them. They were not considered as any secular duty, or as issuing out of land, but in respect to the persons of the laity, in return for the benefit they derived from the ministry and care of their spiritual pastors. 11 Rep. 13 b.

§ 3. Tithes, in their essence, have nothing substantial or permanent; they consist merely *in jure*, and are only a right. An estate in tithes is no more than a title to a share or portion of the produce of the land, after it shall have been separated from the general mass; before severance, it is wholly uncertain what the amount of that share or portion may be: nay, its very existence is precarious; this, like its quality, depending upon the accidents of climate, season, soil, cultivation, and the will and caprice of the several owners and possessors. If the ground be not sown, if the farm be not stocked, if the fruits be not gathered, no tithe can possibly arise; for tithe is payable not in respect of the land, but of the person. It is not an estate in the land, but a right to a determinate proportion of the fruits, with all the industry and expence that have been bestowed in bringing them forward and collect-
E 3 ing

Cro. Eliz
161.

ing them. Tithes, then, are not an object of the senses: they are neither visible nor tangible; their produce, indeed, may be seen and felt, but they exist only in contemplation of law: it follows, therefore, that they are incorporeal; for the law ascribes corporeity only to those objects, which are substantial and permanent.

Different
Kinds.

§ 4. Tithes are of three kinds; predial, mixed, and personal.

Gwill. 356.
430.

Predial tithes are such, as arise merely and immediately from the vegetable produce of the land; because, a piece of land or ground being called in law *prædium*, whether it be arable, meadow, or pasture, the fruit or produce thereof is called predial. Nor is any allowance made in this respect for the trouble and expence of raising any species of vegetable which yields profit.

Sear v. Trin.
Coll. Gwill.
1445.

§ 5. The profit of keeping and depasturing cattle, which is usually called *Agistment* or *Pasturage Tithe*, is a predial tithe; because it arises immediately from the land. This was formerly doubted, but is now fully established by a determination of the court of exchequer.

§ 6. Mixed tithes are those which arise not immediately from the profit of the land, but from the produce and increase of animals nourished by the land, in which they differ from agistment tithe; which is paid, not for the increase or improvement of the animal agisted, but for the grass eaten by it, and is proportioned to the value

value of the grafs, not to the value of the improvement of the animal.

§ 7. Personal tithes are the profits which arife from the labour and induftry of man employing himfelf in fome personal trade or employment, being the tenth of the clear profits after deducting all expences. 2 Inft. 656.

§ 8. Again, tithes are divided into great and fmall. Where the tithe of a thing is *magnus ecclefie proventus*, it is reckoned among the great tithes; but, where it is *parvus ecclefie proventus*, it is confidered as a fmall tithe. Gwill. 429.

§ 9. The tithes of corn, hay, and wood, are called *Great Tithes*, becaufe they are in general of much greater value than any other fpecies of tithe: and the predial tithes of other lefs valuable vegetables, together with mixed and personal tithes, are called *Small Tithes*.

§ 10. Formerly, it was doubtful, whether the diftinction between great and fmall tithes, arofe from the nature of the vegetable, or from the quantity of it, in any particular parifh. But it is now fettled, that the quantity of any particular vegetable raifed in a parifh, cannot alter the nature of the tithe: for, in that cafe, corn and hay might in fome parifhes be a fmall tithe. And, in conformity to this principle, Lord *Hardwicke* determined, that the tithe of potatoes, although fown in great quantities in common fields, was a fmall tithe. Norton v. Clark, Gwill. 428. Smith v. Wyatt, Gwill. 777.

Sims v. Ben-
nett,
Gwill. 874.
7 Bro. Parl.
Ca. 29.

§ 11. This doctrine has been confirmed by a determination of Lord Keeper *Henley*, who held, that tithes are by law denominated, and adjudged to be, great or small, according to the nature of the vegetable, and not from the mode of cultivation, or the use to which it was applied.

§ 12. The tithes of all those vegetables, which have lately been introduced into *England*, such as hops, madder, and woad, are deemed to be small tithes.

§ 13. Predial tithes, consisting of the immediate produce of the land, are due of common right; it being a principle of the common law, that all lands ought to pay tithes. But mixed and personal tithes are only due by custom: and, therefore, where they have not been usually paid, they are not demandable.

§ 14. Formerly, it was held, that tithes were only payable of such things as yield an annual increase: but this rule has been deviated from, in the case of some vegetables, which produce a crop only every second or third year; and in the case of underwood or coppice, which is only cut once in seven or ten years.

1 Infl. 651.

§ 15. It was also formerly held, that tithe was only due once in the same year; but it has been held in two modern cases, that, if divers crops are grown on the same land in the same year, tithe is payable of each crop.

Bunb. 10.
314.

§ 16. It has also been established in many instances, that no tithe is due of that which produces another titheable substance; but this rule has also been deviated from in several cases. 2 Gwill. 562.

§ 17. With respect to predial tithes, it is a general rule, *Quod quicquid oritur ex prædio, decimæ ejusdem sunt prædiales*: and, of these predial things, some are *fructus naturales*, which grow naturally without the industry or labour of man, as grafs, fruit, herbs, &c.: and others are *fructus artificiales, vel industriales*, to the growth of which industry and labour are requisite, as corn, &c.; and the tithes of these are called *decimæ provenientes*, and *decimæ fixæ*, because they arise *ex fructibus stirpis in terrâ fixæ*. Of what Things Predial Tithes are due. 1 Gwill. 429.

§ 18. Corn is a predial great tithe, of which the tenth shock, cock, or sheaf, is due to the rector, unless where the custom of the place is otherwise.

§ 19. Tithe is not due from the rakings of corn, involuntarily scattered; but, where the rakings are of great value, or if they are left on the land covinously, tithe shall be paid for them. 1 Inst. 651. Gwill. 477. 562. 12 Mod. 235.

§ 20. It is laid down, that no tithe is payable for stubble; 1st, Because the corn is titheable, which is the principal, and the stubble is of no value: 2d, Because, in the case of stubble, there is no second renewing. And, in a subsequent case, it was held, that stubble used partly for fodder and partly for manure, was not titheable, the whole of it being used in husbandry; Gwill. 477. Id. 1438.

bandry ; which was not the case of a farmer, leaving an unusual quantity of stubble in order to make a fraudulent profit of it.

Austin v.
Nicholas,
Gwill. 615.
Nicholas v.
Elliott,
Bunb. 19.
Gwill. 656.
876.

§ 21. Every other species of grain, such as beans, peas, cultivated for sale, are titheable ; and, whether they are set, drilled, sown, or planted in rows in a garden-like manner, they are small tithes : and the use of a plough instead of a spade, after a new improvement, makes no difference. But, in other cases, peas and beans have been considered as a great tithe.

Bunb. 279.

§ 22. Tares and vetches are titheable, unless they are cut green, and given as food to milch kine, and horses employed in husbandry.

Warner's
Case.
Cro. Jac. 47.
9 Vin. Ab.
13.
Selby v.
Bank, 12
Mod. 498.

§ 23. Hay is subject to the payment of tithe, notwithstanding beasts of the plough or pail, or sheep are fed therewith. And it was formerly held, that a right to tithe of hay accrues upon the mowing of the grass ; and that the subsequent application of it, either while it was in grass, or after it was made into hay, to feeding beasts of the plough or pail, did not take away the right to tithe.

Crawley v.
Wells,
1 Roll. Abr.
645.

§ 24. In a subsequent case, however, it is laid down, that if a person cuts grass, and, while it is in the swarthe, carries it and feeds his plough cattle therewith, not having sufficient sustenance for them otherwise, tithe is not due thereof.

§ 25. In a much later case, the court of exchequer seemed to be of opinion that tithe is not due of vetches or clover, cut green and given to cattle used in husbandry. And the law is so clear, that grass newly cut and eaten by agricultural cattle, is not titheable; that in a recent case, the bill as to this point, was dismissed with costs.

Hayes v. Dowse,
Gwill. 679.
Vide *Id.*
1504.

Collyer v. Howse,
Anstr. 481.

§ 26. It is laid down in several cases, that tithe is not due of aftermath; because tithe can only be due once in the same year from the same ground; but, in 33 *Cha.* 2. the court of exchequer was of opinion, that of common right tithes of aftermath, or of the after crop of grass mowed, there being no prescription or custom against or in discharge of the same, ought to be paid. And Doctor *Burn* says, that the modern determinations have been, that the aftermath of meadows is part of the increase of the same year, and consequently titheable.

Margetts v. Butcher,
Gwill. 531.

§ 27. Clover, saintfoin, and rye grass, being considered as a species of hay, are titheable; and a second crop of clover is titheable, as well as the first: this species of hay belongs to the person entitled to the tithe of common hay, and is therefore a great tithe.

Gwill. 530.
Id. 584.

Wallis v. Pain,
Com. R. 633.
Gwill. 755.

§ 28. By the statute 45 *Edw.* 3. c. 3. it was enacted, that great wood of the age of 20, 30, or 40 years, or upwards, should not be titheable; but that *sylvæ caduæ* or underwood should be titheable.

Gwill. 3, 4, 5.

2 Inst. 648.

Lord *Coke*, after stating this act, says that two doubts arose on its construction: first, what should be said great wood; secondly, of what age the same should be, because it is parcel of the inheritance, and that the word *grossa* signifies such wood, as hath been or is, either by the common law or custom of the country, timber; for this act extends not to other woods, that have not been or will not serve for timber, though they be of the greatness of timber.

Idem.

§ 29. All trees, which serve for the reparation of houses, mills, cottages, &c. such as oak, ash, and elm, are deemed timber within this act: so is beech, horn-beech, and horn-beam, where used for building, contrary to the opinion of *Plowden* 470. which the court, upon deliberate advice held not to be law.

Idem.

§ 30. As to the second doubt, of what age those timber trees, whereof no tithes should be had, must be, the statute resolves this doubt in these words—Great wood of the age of 20 years or upwards—which point was also declaratory of the common law,

§ 31. Tithe is, in general, due of beech, birch, hazel, willow, fallow, alder, maple, and whitethorn trees, and of all fruit-trees of whatsoever age they are; because the wood of these trees is not usually employed as timber. But, if any of these trees have been used as timber, they are not titheable,

Walton v.
Tryon, Gwill.
827.

§ 32. In a case, where tithe was demanded of beech of above twenty years growth, Lord *Hardwicke* said, this

this depended on the question of fact, whether beech was timber by the custom of the country: and his Lordship said, that the issue should be whether, by the custom, beech growing within the parish of *M.* are, and have used to be, deemed timber.

§ 33. It is said by Lord *Coke*, that no tithes shall be paid of *sylva cædua*, employed in hedging, or for fuel, or for maintenance of the plough or pail.

2 Inst. 651.
Gwill. 562.

§ 34. In a subsequent case, it was determined, that, where a person cut down underwood for the purpose of fencing his own corn, it was not titheable. But a custom, that underwood cut and used for fencing of corn, generally, whereof tithes are payable, and not sold or otherwise disposed of, should be discharged from the payment of tithes, was held void.

Croucher v. Collins,
Gwill. 1576.

§ 35. This doctrine has been contradicted in the following case.

In a bill for tithes of wood, the defendant said, he felled yearly, at ten years growth, five acres of wood, worth twenty-five shillings an acre; which he used in amending his hedges, and upon his land, and so was of no profit to him.—Decreed to account.

Smith v. Williams,
Gwill. 608.

§ 36. Tithe is not due of *sylva cædua*, used in making or repairing carts or ploughs, to be employed in husbandry, in the parish, wherein the wood grew; because, by the use of carts and ploughs, the tithes of other things are increased.

Anon.
Gould. R. 93.

Anon.
Bunb. 20.

§ 37. If the tithe of hops and the tithe of wood are both due to the same person, tithe is not due of *sylvæ caduæ*, used in poling the hops; because the tithe of the hops is increased by the use of the poles.

Gwill. 828.
969.

§ 38. By the common law, tithe is payable of wood employed in the house for fuel; but there may be a custom, that it is not titheable.

Walton v.
Tryon,
Gwill. 327.

§ 39. Where trees are considered as timber, either by common law or by custom, no tithes are to be paid of the lops or tops of such trees, for whatever use they are cut; with this exception, that is, in certain peculiar cases, where a fraud is actually attempted upon the parson; or from necessity to avoid fraud.

Agiftment.

§ 40. The profits, arising from agiftment or pasturage of cattle, are titheable of common right; because the grass that is eaten is titheable, and must have paid tithe, if cut when full grown. And, in a modern case, it was determined that agiftment was a small tithe.

1 Will. R.
170.

1 Inst. 651.
Bunb. 446.

§ 41. This kind of tithe, however, is payable only for dry or barren cattle, that otherwise yield no profit to the parson, and not for cattle which are kept for the plough or pail in the same parish; because the parson has tithe for them in another way.

Gwill. 558.
1571. 1582.

§ 42. Agiftment tithe is not payable for horses kept for husbandry, saddle-horses, coach-horses, or other horses used merely for pleasure. But, where coach-horses were used in carrying coals and manure into another

another parish, an agistment tithe was held to be payable for them.

Thorp v.
Bendlowes,
Gwill. 899.

§ 43. Meadow grounds, which have paid tithe of hay, are not afterwards liable to an agistment tithe.

Ayd v.
Flower,
Gwill. 613.

§ 44. Agistment tithe is payable by the occupier of the ground, not by the owner of the cattle: and, as this tithe cannot be taken in kind, the person entitled to it can only receive what it is valued at, according to the price paid for the keeping of different beasts.

3 Burn. 448.

§ 45. Hemp and flax are titheable; but, to encourage the growth of these articles, it is enacted by the stat. 11 and 12 *Wm.* III. c. 16. that every person, who shall sow any hemp or flax, shall pay to the parson, vicar, or impropriator, yearly the sum of 5*s.* and no more for each acre of hemp and flax so sown, before the same be carried off the ground.

Hemp, Flax,
&c.

§ 46. Madder is also titheable by statute, in the same manner as hemp and flax.

§ 47. Hops are titheable, and accounted among small tithes. The tenth of this article is to be paid after they are picked, and before they are dried.

§ 48. Turnips are subject to tithe when severed, though there be more crops than one in the year. And, in a bill for tithe of turnips, the defendant insisted, that no tithe was due for turnips, sown after corn the same year; and that he ought not to pay tithe for

Gwill. 606.

for any crop or profit of arable land the same year that the parson received tithe-corn from the same ground : but the tithe was decreed.

Crow. v.
Stodart,
3 Burn 465.
Gwill. 714.
S. P.

§ 49. An agiftment tithe is also due for turnips, sown after corn, and not severed, but eaten by unprofitable cattle ; though it was urged to be an improvement of the land, and that the parson had the benefit of it in the next year.

Gardens.

3 Burn 466.

§ 50. All garden herbs and plants, such as parsley, fage, cabbage, are titheable ; and the same is a small tithe ; but, most commonly, a certain sum of money is payable in lieu of tithes of gardens, either by custom, or by agreement with the vicar.

3 Burn 466.

§ 51. All fruit of trees are predial tithes, to be paid when they are gathered. If they are stolen, the parson as well as the owner shall bear the loss ; but, if the owner suffer a stranger to take his fruit, the tithe shall be answered.

Adams v.
Waller,
Gwill. 1204.

§ 52. A claim was made, in the year 1780, by the vicar of *Kenfington*, to the tithe of hot-house plants. The court of exchequer was of opinion that they were titheable ; but the case went of on another point. It has, however, been determined by the same court in a subsequent case, that hot-house plants are not titheable.

Worrall v.
Miller.
Mich. 1801.

Of what
Things mixed
Tithes are
due.

§ 53. Mixed tithes consist, first of the tenth of the young of cattle bred in the parish ; such as calves, lambs,

lambs, kids, pigs, &c. And the time of payment of this tithe is, when the animals are weaned, and able to live without the dam; unless the custom of the place be otherwise. 3 Burn 467.

§ 54. The wool of sheep and lambs is another mixed tithe: it is *de jure* due at the time it is clipped; but, by prescription, it may be set out altogether at another time.

§ 55. Milk and cheese are titheable; but, where tithe-milk is paid in kind, no tithe-cheese is due: and, where tithe-cheese is paid in kind, no tithe-milk is due. 3 Burn 476.

§ 56. By the statute 2 and 3 *Edw. 6. c. 13.* it is enacted, that every person exercising merchandize, bargaining and selling, clothing, handicraft or other art or faculty, who had within 40 years preceding paid personal tithes, should pay the tenth part of his clear gains, after deducting all charges and expences, except day-labourers. Of what Things personal Tithes are due.

§ 57. It was formerly held that, in consequence of this statute, the fees of a lawyer, physician, attorney, &c. and a man's salary, were titheable. But it was settled, that personal tithes were only payable *per justum possessorem*: and, therefore, tithes were not to be paid of a harlot's hire, or of gains made by robbery, or other illegal courses. Gwill. 430.

3 Eccl. Law,
474.

Dr. *Burn* observes, that personal tithes are now scarce any where paid, unless for mills, and fish caught at sea.

What Things
are not tithe-
able.

§ 58. There are several things which are not titheable by common right, though, in some places, they may be titheable by custom.

2 Inst. 651.

§ 59. No tithes are payable for quarries of stone or slate, nor for mines of tin, lead, coal, lime, chalk, marle, or the like : for these are of the substance of the earth, and are not an annual produce.

Watf. c. 46.

60. Houses are not titheable at common law, for the same reason ; but, by custom, tithe is in some towns payable for houses, in a proportion to the rent reserved for them. And, in the city of *London*, tithes are payable for houses by act of parliament.

Bunb. 102.
106.

2 Inst. 655.

§ 61. By the statute 2 and 3 *Edw. 6. c. 13.* all barren heath and waste ground, which shall be improved and converted into arable, or meadow, shall not pay tithes, for seven years after such improvement.

3 Burn 393.

§ 62. Forest land is not titheable, provided it is in the hands of the king, or of his lessee ; but, if the forest be disafforested, and be within any parish, then it becomes titheable.

2 Inst. 651.

§ 63. No tithe is due at common law for animals that are *fera naturæ*, such as deer, rabbits, &c. ; but,
by

by the custom of many places, some animals of this kind are titheable. Gwill. 427.
840.

§ 64. It is said by Lord *Coke*, that, before the council of *Lateran*, which was held in the year 1180, every person was at liberty to pay his tithes to whatsoever church or monastery he pleased: or, he might pay them into the hands of the bishop, who distributed the revenues of his church among his diocesan clergy. But, when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister or rector: first, by common consent, or the appointment of the lord of each manor, and afterwards by the law. To whom
Tithes are
due.

§ 65. Where a person has any part of the tithes within the parish of another person, this is called a *portion* of tithes: and these portions are supposed to be prior to the council of *Lateran*, when it was lawful for every one to distribute his tithes, or any portion thereof, to whatever church he pleased. And a portion of tithes did not become extinct, by vesting in the same hands with the rectory. Dyer, 84 b.
2 Inst. 641.

2 Roll. R. 161.

§ 66. When the practice of appropriating advowsons to monasteries was introduced, the monks usually deputed one of their own body to perform divine service in those parishes of which the society was rector, who was called the *vicar*: but, by several statutes, it was ordained that such vicar should be a secular priest, and sufficiently endowed, at the discretion of the ordinary. The endowments were usually of the small tithes, the Of rectorial
and vicarial
Tithes.
1 Burn 60.

greater or predial tithes being still reserved for their own use; from whence arose a division of tithes into rectorial and vicarial.

Greene v.
Austin,
Gwill 226.

§ 67. The rector or parson is, *primâ facie*, entitled to all the tithes of the parish: and, therefore, payment of the tithes to the parson is a sufficient discharge against the vicar; because all tithes of common right belong to the parson, and the vicarage is derived out of the parsonage; so that no tithes belong *de jure* to the vicar, but only on an endowment, or by prescription, which ought to be shewn *ex parte* of the vicar. And the court cannot intend it: for the vicarage is a diminution or impairing of the parsonage, of which the court will not take notice, unless the parties shew it.

Awdry v.
Smallcombe,
Gwill. 1526.

§ 68. Where the vicar produces an endowment, then the situation of the parties is reversed; the *primâ facie* title, to the extent of that endowment, is in favour of the vicar; and, if the rector would claim any of the articles, comprehended within the terms of it, the *onus probandi* is thrown upon him. In such case, it is incumbent on the rector to give such clear and cogent evidence of an usage in the parish in his favour, with respect to the articles he would insist upon, as shall narrow the terms of the endowment, and induce a presumption, that the parties interested in the tithes had come to a new agreement; that some different arrangement had been made with respect to the distribution of the tithes, between the date of the endowment and the disabling statute of queen *Elizabeth*.

§ 69. It has been determined, that, if a vicar hath for a long time used to take particular tithes or profits, he shall not lose them, because the original endowment is produced, and they are not there. For, as every bishop had an indisputable right to augment vicarages, as there was occasion, and this, whether such right was reserved in the endowment or not, the law will therefore presume, that this addition was made by way of augmentation,

Burn 74.

§ 70. The loss of the original endowment is supplied by prescription; that is, if the vicar hath enjoyed any particular tithe for a long time, the law will presume that he was legally endowed with it; for the same reason, that it presumes some tithes might have been added by way of augmentation which were not in the original endowment.

Id.

§ 71. Where lands do not lie within any parish, the tithes thereof are payable to the king.

Gwill. 501.

§ 72. When the monasteries were dissolved, the appropriation of the several benefices which belonged to the religious houses, would, by the rules of the common law, have all become disappropriated, had not a clause been inserted in all the statutes, by which the monasteries were given to the crown, to vest such appropriated tithes in the king, in as ample a manner as the monasteries held the same at the time of their dissolution.

Of Lay Impropriations.

§ 73. All these appropriated tithes were granted by the crown to lay persons, who are called *Lay Impropriators*, and who have the same rights respecting such tithes, as if they were really rectors of the different parishes from which such tithes are payable.

§ 74. Where a portion of tithes was vested in the crown, and afterwards granted to a layman, he acquired the same right to it as the spiritual person in whom it was formerly vested had.

§ 75. By the statute 32 *Hen.* 8. c. 7. s. 7. it is enacted, that all persons having tithes thus vested in them, shall have the same remedies for the recovery thereof as for lands and tenements. And Lord *Coke* says, that tithes in the hands of laymen are temporal inheritances, and shall be accounted assets; husbands shall be tenants by the curtesy, and wives endowed of them, and shall have other incidents belonging to temporal inheritances.

Bunb. R.
325.

§ 76. A lay rector is now entitled to tithes of common right, as fully as a spiritual rector. And it is sufficient for him, where he files a bill for tithes, to set forth that he is seised of the impropriate rectory: and, if he makes out his title to that, it will be sufficient, without bringing proof of his having received tithes.

§ 77. A person may have an estate in fee, in tail, for life, or years, in tithes, which may be aliened, charged,

charged, or incumbered, in the same manner as lands : Tit. 35. 36.
 fines may be levied of them, and recoveries suffered ; Tit. 11. c. 3.
 and they are within the statute of uses. f. 25.

§ 78. The possession of a portion of tithes severed from a rectory for 250 years, is a sufficient title ; as a court would, in such case, presume a conveyance. Long Possession of a Portion of Tithes gives a Title.

§ 79. An action was brought to recover a deposit made by the plaintiff upon his bidding for the manor of *Elham*, and lands at *Elham* in *Kent*, of which 549 acres were represented by the particular of sale, to be tithe free, or rather, that the vendor was entitled to the tithes of those lands. Oxenden v. Skinner, 4 Gwill. 1513.

An objection was made to the title of the vendor to the tithes, as to which the facts were. The priory of *Rocheſter* was entitled to a portion of the tithes of the lands fold. *Henry* 8., in the 33d year of his reign, granted them to the dean and chapter of *Rocheſter*, but they never had possession of them ; nor had any tithe ever been paid of the lands in question, except a modus of 20 s. to the vicar.

The manor of *Elham* escheated to the crown in 41 *Edw.* 3., and was granted by *Rich.* 2. to feoffees, in trust for St. *Stephen's* chapel at *Westminster*, where it remained till the dissolution of colleges and chantries in 1 *Edw.* 6., who granted it with all its rights and appurtenances to Lord *Clinton*. It was reconveyed to the crown the next year ; and *James* 1. granted it to

Sir *Charles Herbert* in fee, with all its rights and appurtenances ; from whom it came to the vendor.

On the part of the plaintiff, it was insisted, that here was no pretence of an exemption from payment of tithes. That the title to them was in the dean and chapter of *Rochester* ; and that, if a grant from them was to be presumed, the tithes were not conveyed by later deeds, for want of express words, and therefore were in the crown, or in the heirs of Sir *Charles Herbert*.

On the part of the defendants, it was admitted, that this was not an exemption. But it was said, that, from a possession of 250 years, a conveyance from the dean and chapter of *Rochester* prior to 13 *Eliz.* would be presumed ; and that the general words were sufficient to convey the tithes as profits of the lands.

Lord *Kenyon*, before whom the abstract and all the opinions taken on both sides had been laid, said :—
 “ All objections are admitted to be removed, except
 “ that which relates to the tithes. A court of equity,
 “ in these cases, has a discretion, which I, sitting here,
 “ cannot exercise, as I am bound to tell the jury, that
 “ the plaintiff cannot recover his deposit, if there be
 “ a good title to these tithes ; and on all the circumstances, I think there is such good title. Here is
 “ possession of them for 250 years. Who can disturb
 “ the title ? The rector cannot. These tithes have
 “ been severed from the rectory ever since the conquest. If these tithes had been part of the rectorial
 “ tithes,

“ tithes, no time would have barred the rector.
 “ Where is there any other right? The dean and
 “ chapter of *Rocheſter* might before the 13 *Eliz.* have
 “ alienated them. I am very clear that, on a poſſeſ-
 “ ſion of two centuries and a half, I muſt tell the
 “ jury, that they ſhould preſume any conveyance from
 “ the dean and chapter.”

Mr. *Law* then ſuggeſted, that there were no words
 of conveyance of the tithes.

Lord *Kenyon* :—“ I think the tithes do paſs. The
 “ vendor will now convey as you pleaſe, and in what
 “ form of words you pleaſe. I think I ſhould ex-
 “ erciſe my diſcretion in a court of equity, in the ſame
 “ way I do my diſcretion here, where I am bound by
 “ ſtrict law, and muſt tell the jury, that there is a
 “ good title. Such a length of poſſeſſion is a *poſitive*
 “ *preſcription*, as they ſay in the civil law. The church
 “ of *Rocheſter* never had the tithes, as of common
 “ law right. I muſt tell the jury that it is a good
 “ title, and that the plaintiff cannot recover.”

The plaintiff was nonſuited.

§ 80. Lands may be exempted from the payment of
 tithes in various ways : ſuch exemptions however ariſe
 not from any natural or inherent quality in the land,
 but from collateral reaſons.

Of Exemp-
 tions from
 Tithes. •

§ 81. The firſt kind of exemption from tithe, is
 called a preſcription *de non decimando*, which is a claim

Preſcription
*De non deci-
 mando.*

to

to be entirely discharged from tithes, and to pay no compensation for them; and may be a privilege annexed, either to the persons holding lands, or to the lands themselves.

Watf. 506.

§ 82. The king, who is said to be *persona mixta*, being capable of having tithes, may prescribe to be discharged from the payment of tithes. For the rule is, that those, who are capable of having tithes, may be discharged from the payment of them: therefore lands, lying within a forest, and in the hands of the king, do not pay tithes, although they are within a parish; but this privilege extends only to the king's lessee, and not to his feoffee.

Watf. 503.

§ 83. Spiritual persons, or corporations being capable of having tithes in perannuity, may prescribe to be discharged generally: so that no tithe shall be paid of their own lands, nor any recompence for them. Besides, it is a maxim of law, that *ecclesia decimas non solvit ecclesiæ*; and a spiritual person may prescribe *de non decimando* for himself, his farmers, and tenants, and also for his copyholders: for, by this means, it is to be presumed, that the bishop has greater fines and rents.

2 Rep. 44.
Bp. of Winchester's case.

Crouch v.
Frier, Cro.
Eliz. 784.

Blencq. v.
Marston,
Cro. Eliz.
479. 578.

§ 84. The rector of a parish is not liable to the payment of tithes to the vicar, nor the vicar to the rector: and a lay impropiator is also exempted from paying tithes to the vicar, out of the glebe, as long as he holds it in his own hands. But, upon the death
of

of the rector, vicar, or lay impropriator, his executor is liable to tithes of the growing crop.

§ 85. A prescription *de non decimando* may also be annexed to the lands, though in the possession of lay persons; but this can only arise from the following circumstances.

§ 86. By the canon law the orders of cistercians, knights templars, and hospitallers, and also the premonstratenses, were exempted from the payment of tithes out of the lands, which they possessed prior to the year 1215.

Upon the dissolution of the abbies and monasteries by Henry 8., these exemptions from tithes would have fallen with them; and the lands would again have become titheable, had they not been supported and upheld by the statute 31 Hen. 8.; by which it was enacted that the king, his heirs and successors, and all other persons, their heirs and assigns, who shall have any of the dissolved abbies, shall enjoy them discharged from payment of tithes, in as ample a manner as the abbots held and enjoyed the same.

§ 87. In consequence of this statute, if a man can shew that his lands were formerly in the possession of any of the privileged religious orders, and thereby, or from any other cause, exempted from the payment of tithes, he may plead a prescription *de non decimando*.

Nash v. Molins, Cro. Eliz. 206.

§ 88. Where a person was tenant for life, under a settlement, of lands, which were formerly part of the possessions

Hett v. Meeds, in Scacc. 1799. 4 Gwill. 1515.

possessions of the cistercian order, and by that means exempt from tithes while in the manurance of the owner : It was contended, that the tenant for life had not such a quantity of interest, as would support that privilege ; that, to entitle the lands to that exemption, the person occupying them must be the owner of the inheritance ; he must have the same estate in him, which the monastery had. That, in the case of *Wilson v. Redman*, *Hard.* 174., the court held, that tenant for life or years was not within the statute ; but that tenant in tail, who had an estate of inheritance, was discharged *quamdiu propriis manibus*, &c.

Lord Ch. Baron.—“ It is admitted in this case, that
 “ a tenant in tail is intitled to the exemption which
 “ is claimed ; but it is argued, that a tenant for life
 “ under a settlement is not. It was said, that the
 “ tenant must hold the lands as the monastery held
 “ them, else the privilege cannot attach. But it is im-
 “ possible that the lands can now be holden precisely
 “ in the same manner as they were holden by the mo-
 “ nastery ; the monastery had them to them and their
 “ successors, but now a man has them to him and his
 “ heirs. But a fee simple may be divided into por-
 “ tions, into different estates for life, in tail, and re-
 “ mainder in fee. Where will be the difficulty to say,
 “ that the tenants of each portion shall have the benefit
 “ as they succeed ? The case of *Wilson v. Redman* has
 “ been cited ; but, from an extract from the answer
 “ in that case, which I have been furnished with, the
 “ parties there appear to have had a fee simple ; and
 “ therefore that not being a case in which it was ne-
 “ cessary

“ cessary to decide the point, it cannot be considered
 “ of any authority. I confess, I cannot see any reason
 “ why a tenant for life should be excluded from the
 “ benefit, any more than a tenant in tail, who, it is
 “ agreed, is exempt: there seems to be no reason,
 “ why all the component parts of the estate should
 “ not be exempt as they severally come into pos-
 “ session.”

The court decreed unanimously, that the tenant for life was exempt, and dismissed the bill as against him, but without costs.

§ 89. These are the only grounds, on which a prescription *de non decimando* can in general be founded: for it has long been established, that there can be no prescription *de non decimando* against the church; without shewing the reason of it. And that the presumption arising from a constant non-payment of tithes, will not be sufficient, unless the tenant can shew either that the lands were parcel of the possessions of one of the privileged religious orders, or that a real composition had been made, by which the tithes were released.

§ 90. It appears also to have been formerly held, that a prescription *de non decimando* could not be pleaded against a lay impropriator without shewing the ground of exemption; but this doctrine has been doubted in some modern cases.

Whether
 good against
 a Lay Impro-
 priator.
Bury v. Evans,
Com. R. 643.

Fanshaw v.
More,
Gwill. 780.
17 Geo. 2.

§ 91. A bill was brought in the exchequer by a lay impropriator, for tithe of hay and potatoes. The defence was, that no tithe had ever been paid for the land, nor any modus or composition. It was said for the defendant that the reason, why a layman should not prescribe in *non decimando*, was founded on principles, which did not hold since tithes were lay inheritances. That now, from length of time and possession, there was the same reason to presume a grant from the lay impropriator, in this case, as in cases of other inheritances. That this was not used as a prescription; but as an evidence of right, and to include a presumption of a grant. That, before laymen were capable of tithes, an exemption was not sufficient to arise from non-payment of tithes only, but since, it is quite otherwise; and possession in the hands of a layman is as good evidence of a right to tithes, as of any other right.

The Lord Chief Baron was of opinion, that a layman could not prescribe in *non decimando* against a lay impropriator, no more than against a spiritual one. That it had been said that the statute of *Henry 8.* which made tithes lay inheritances, had altered the case; but that a prescription from that time would not be good; and consequently that statute could not create a right by prescription. That this doctrine was not inconvenient: for grants of tithes might be preserved by inrollment, and therefore were not likely to be lost, if due care was taken of them. That an act of parliament was attempted to remedy this by Sir *George Heathcote*, about fifteen years before, which miscarried.

Baron *Carter* was of the same opinion.

Baron *Reynolds* doubted.

Baron *Clarke* said, he knew no case, which deserved more consideration: for, though the authorities against such a prescription were very great, yet the reason of them grew weaker every day. Before the reformation, all tithes were ecclesiastical; and a layman could have tithes by way of discharge only by the grant of patron, parson, and ordinary. Since that, there were other ways both of having tithes, and of being discharged from them. Since tithes had been in the hands of lay impropiators, many persons had purchased discharges for their particular lands; yet, if those grants were lost by the common fate of things, those persons must lose the benefit of their purchases, and that must often happen, though they were enrolled, or any other way was taken to preserve them. Very few records of the church were extant; and it would be very hard that time, which strengthens all other rights, should weaken this. It seemed very extraordinary, that a layman might prescribe, upon a presumption of a grant, for a portion of tithes in the soil of another, even against the rector of the parish; and yet could not prescribe for the tithes of his own lands, in the same way. If, therefore, he should concur in this opinion, it would be merely from the force of authority: for he thought that the reason of the thing was strong against it. He allowed that, in general, authorities ought to prevail in law; because great inconveniences and confusion would arise from overturning established rules of property.

Title XXII. Tithes. § 91—93.

perty. But, in this particular case, the inconveniences and confusion of property would be much greater, from pursuing those resolutions, than from overturning them.—Mr. *Joddrell*, from whose notes this case was taken by Mr. *Gwillim*, says he was informed, that judgment was given for the plaintiff.

Nagle v. Edwards,
3 Anstr. 702.

§ 92. The plaintiff sued in the exchequer as lay impropriator of the parish of *L.* for tithe of hay and agistment. The defendant insisted, that, from tithes of hay never having been paid to the rector, within memory, a conveyance of them to the landholder should be presumed.

Lord Chief Baron *Macdonald*.—"The plaintiff
" having made out to himself a clear title as rector,
" the defendant insists on exemption from payment of
" hay and agistment tithe on the ground of never
" having paid these tithes: from non-payment he
" wishes the court to presume a grant or conveyance
" of these tithes from the lay impropriator. It is
" clear, that, against an ecclesiastical rector, this de-
" fence could never be set up in any shape. Whether
" a lay impropriator should have the same benefit,
" was at first doubted; but that point seems now at
" rest. Three successive decisions upon it have fully
" established, that there is no difference between a lay
" and an ecclesiastical rector." The court decreed an
account.

Vide Lord Petre v. Blencoe,
3 Anstr. 945.

§ 93. Notwithstanding the authority of this determination the court of chancery has in the following case,

case, appeared to entertain considerable doubts on this point.

§ 94. An estate was sold by auction, and ninety-four acres of it were stated in the particulars of sale to be exempt from the tithe of hay. It was objected, that this exemption was not ascertained by the abstract. No tithe of hay had ever been taken, within the memory of man; nor had any thing been paid in lieu of it: and other tithes had been regularly taken, and the tithes of the parish were all in lay hands.

Rose v.
Calland,
5 Ves. Jun.,
186.

A bill was filed by the vendors to obtain a specific performance of the agreement, entered into by the defendant for the purchase of the estate.

It was argued for the plaintiff, that a presumption ought to be raised against a lay impropiator. That the absurdity of holding, there could not be a presumption against him was evident, from this instance: An estate was sold in the adjoining parish, free from the payment of great tithes; but the conveyance of the tithes could not be found; and the same objection would have been made, if the deeds conveying the tithes had not at last been found by accident.

Lord Chancellor *Eldon* said, the question was very important: for, if he was to hold it a flat objection to the title, that would go upon the presumption that it was a clear point of law, that a lay rector, who could convey, contract and diminish his right, which a spiritual rector could not, was not to be barred from

his right to any particular tithe, by length of time ; or the circumstances attending the receipt of his other tithes : he should be very loth to go that length. On the other hand, he should be very unwilling to make a man purchase a law suit : the argument was certainly very strong upon the instance mentioned, where the deeds were found by accident.

Ante § 92.

His lordship on another day said, that upon the case of *Nagle v. Edwards* the difficulty was, how he could make a person take a title in the face of that decision : if he did, he decreed him to enter into a law suit. That case was upon the tithe of agistment : there was a very long possession, and all the inconvenience to induce the court to raise the presumption. He desired to be understood, as not entirely agreeing with the determination of the court of exchequer ; but he should be in a strange situation in desiring a purchaser to take the title, because he thought the point a pretty good one ; though the court of exchequer had determined against it. The bill was dismissed without costs.

Non-payment
will support a
claim to a
portion of
tithes.

§ 95. There is a material difference between a prescription *de non decimando*, and a claim to a portion of tithes. In the latter case, if the claim be supported by evidence of actual perannuity and enjoyment for a long time, a court of equity will not interfere, but leave the parties to their legal remedy.

Scott v.
Ayrey,
3 Gwill. 1174.

§ 96. Doctor Scott, being rector of *Simenburne* in *Northumberland*, filed his bill in the court of exchequer, for the tithes of corn and grain of a farm called

Eal's

Eal's Farm. The defendants, the *Ayreys*, were owners of part of the lands, and claimed the tithes of *Eal's Farm*. The question was, whether the plaintiff was entitled to the tithes of corn and hay of the lands, of which the *Ayreys* claimed the tithes.

The Lord Chief Baron observed, that the present case was not a demand for tithe of land, which had hitherto paid no tithe; and that the defence was not a prescription in *non decimando*. In all such cases, the rule had been, that a person setting up an exemption from the payment of tithes, must shew the particular ground of exemption. If that is not shewn, the defence amounts to no more than a mere non-payment of tithe; which, however long, is no defence: but, in the present case, the plaintiff claimed the tithe of land, of which tithe had been constantly taken. For, although a part of the land had not actually paid tithe, it had been no otherwise exempt, than because the tenant of that part had been tenant of the tithe of all. The tithes having been actually paid, the next question was, how they had been paid: they had been paid from particular lands in the nature of a portion of tithes. It appeared that, in the year 1608, these tithes were in the possession of the family of *Ridley*, that they were sold in 1683 to one *Whitfield*: that, in 1708, they were conveyed to *Green*, in fee. They were afterwards mortgaged: and the devisee of the mortgagee purchased the equity of redemption, and devised to persons, under whom the defendants claimed. For 170 years they had been the subject of sales, mortgages, and devises, as other property; and had always

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been

been considered in the same light as the other real property of the persons, who from time to time had claimed them. They were capable of being enjoyed by the persons, who had enjoyed them : and the question was, whether a court of equity ought to interfere to take the possession from persons, who had been in possession for so many years, with knowledge of the rector. It did not appear how the *Ridleys* became intitled ; but it appeared that, being in possession, they settled, mortgaged, and devised the tithes as their own absolute property. If, notwithstanding this long possession, the plaintiff was legally intitled, he was not without remedy : but it was too much in a case of this kind for a court of equity to interpose, and after so long a possession to take the property from the possessors, and decree the rector intitled to it. The court had been pressed to direct an issue ; but there seemed no reason for the court to interfere thus far. Whether the court directed an issue, which adopted in some degree the plaintiff's demand, or left the plaintiff to pursue his legal remedy, he might make good his demand if it was well founded. It was therefore not absolutely necessary for the court to interpose.

Mr. Baron *Eyre* said, the principal question in this case was, the defence set up by the *Ayres* against the *prima facie* title of the rector, founded on a title set forth in their answer, and the indisputable fact of actual possession, occupation, and pernancy of the tithes. The distinction between a prescription in *non decimando*, and a claim of a portion of tithes is an essential distinction. A prescription in *non decimando* is

is simply unlawful, no such prescription can be maintained. If no tithes have been paid, a tithe, founded upon mere non-payment, is simply a prescription in *non decimando*. Evidence of length of possession the court can pay no regard to; for the possession must have been unlawful, and the court is therefore bound to decree in favour of the common right. No presumption can be admitted to support a mere simple prescription in *non decimando*. If we depart from this rule, we overturn the whole law upon the subject; but there is a great difference between a claim, founded upon a mere non-payment of tithes, and a claim supported by evidence of actual enjoyment of the pernancy of the tithes. The title is not unlawful: there may have been a good title, derived to the party in possession. The title therefore not being simply unlawful, long possession is evidence of the title. The case of *Fanshawe v. Rotheram*, stated at the bar and determined by Lord Northington, appeared to have been mistaken. The ground of that determination seemed to have been, that, however doubtful the case stood as to title, there had been long possession. The claim was of a portion of tithes: the parties might have a good title; and it was not right for a court of equity to disturb the possession. The doctrine was good, applied to that or to this case. There was no difference between a lay impropriator and a rector. The lay impropriator becomes, as it were, a spiritual person; he holds it in the same right. If it is not proper to disturb a possession in favour of a lay impropriator, it is not proper to disturb it in favour of a rector. He concluded by saying, he agreed with the Lord Chief Baron, upon the ground of great

Vide 3 Gwill.
1177.

Jennings v.
Lettis,
3 Gwill. 952.
Edwards v.
Lord Vernon,
3 Gwill. 1177.

length of possession, and the claim being of a portion of tithes, which might be lawful, that the bill ought to be dismissed.

The other Barons concurred.

Strut v.
Baker, 2 Vef.
Jun. 625.

§ 97. A bill was filed in the Court of Chancery by *John Strut*, as patron in fee of a rectory, and as lessee for years of all the tithes under the rector presented by him, against *Baker*, an occupier of lands in the manor of *Graces* in that parish, and Sir *B. Bridges* lord of the manor, and owner of the lands. The object of the bill was, to establish the right of the rector to the tithes, and for an account. The answer of *Baker* stated, that by antient and immemorial usage within the manor of *Graces*, or by other lawful ways and means, the lands in his occupation had been exempted from payment of tithes to the rector in the proportion of two-thirds of all the tithes; and that the lord of the manor was intitled to those two-thirds. The defendants then deduced their title from 37 *Hen.* 8. The rector never received more than one-third of the tithes; the lord of the manor received the other two-thirds, and let some farms with the two-thirds of the tithes: other leases were made, expressly subject only to one-third of the tithes to the rector.

It was contended on the part of the plaintiffs, that the defence, though stated informally, was simply a prescription *De non decimando* in a *que estate*: there could not be such a prescription. If they claimed a portion of the tithes, that must be derived under a title from

from an ecclesiastical person; and they could not so claim, having made their defence upon the ground of a lay fee in the lord.

For the defendants, it was said, that the defence was stated inartificially; but it was not meant to state an exemption from tithes, but an exemption from paying to the rector, because that portion belonged to the lord. It happened, that the same family who had the tithes, had the manor; but it was not asserted, that the lord took them in that character. It was so substantially stated, that the court would leave the plaintiffs to law, according to the late uniform practice of that court and the court of exchequer. Where there had been an actual pernancy of the profits by lay-hands, under conveyances as lay-property, for a great while, the court would not by equitable aid disturb such a possession, which might have a lawful commencement, by calling on the defendants to shew a lawful commencement; and cited the cases of *Fanbaw v. Rothe-ram*, and *Scott v. Ayrey*, and *Edwards v. Lord Vernon*.

Lord Chancellor *Eldon* said, the defence was very fairly to be collected from the answer, which had set out all the facts that constituted the defence, and put the plaintiff into possession of all the case he was to meet. It stated different instruments, family conveyances, purchases, securities made, and recoveries; and, wherever it was necessary to describe specifically the things which passed, as upon the recovery in the writ of entry, upon which the fine to the crown is taken,

the two-thirds of the tithes are particularly mentioned. The parol evidence was the strongest, that could be of reputation. His Lordship said, he was glad to have been furnished with the authorities, in which the courts of chancery and exchequer had refused to aid, against a long possession, accompanied with family deeds and purchases; any inquiry into the right by which tithes were held. Courts of equity had no jurisdiction to affect purchasers; in the course of this long period, during which no tithes had been paid to the rector beyond a third part, there must have been many purchases; and Lord *Northington* laid particular stress upon that. Why was a court of equity to interfere to destroy a title, acquired under a purchase for a valuable consideration? In *Scott v. Ayrey*, there was an actual occupation of the tithes. What was the evidence here? In some of the leases, the lands were described expressly, as subject to one-thirtieth to rector; in others, the farm was let, and the two-thirds of the tithes were particularly specified as demised. On the other hand, when the lessee entered, he did not merely retain, he paid tithes: for he paid a thirtieth instead of a tenth, and that was clearly an ouster *quoad* the two-thirds retained. It was full notice to all succeeding rectors, that it was not by fraud or subtraction, but an assertion of right, in opposition to that of the rector, and a clear adverse possession strongly manifested by paying only one-thirtieth instead of one-tenth. Therefore, the difference was only in words between this case and that of *Scott v. Ayrey*. The manner in which the owner had exercised his right, was by demising the land, and the tithes of the land, to the same person,

and

and receiving an accumulated sum both for the tithe and the land. It was not necessary to enter into the discussion of the title: he could conceive a clear ground; the tradition of the parish shewed it. Was it necessary to put the subjects of this kingdom to account for their tithes, antecedent to the reign of *Hen. 8.*? If so, it was not for a court of equity to put them under that inquisition: therefore he was perfectly warranted in following precedents so very respectable.

The bill was dismissed with costs.

§ 98. A prescription *De modo decimandi*, usually called a *Modus*, is, where custom has established a particular manner of tithing, different from the general mode of taking tithes in kind. This is sometimes a pecuniary compensation, as two-pence an acre for the tithe of corn. Sometimes it is a composition in work and labour; as, that the parson shall only have the twelfth cock of hay, in consideration of the owner's making it up for him. In short, wherever a new mode, different from the general law of tithing exists, it is called a *modus decimandi*.

Prescription
De modo decimandi.

§ 99. It is probable, that every *modus* had its commencement by deed; because a composition for tithe can never become a *modus*, unless the patron and ordinary be parties to it, or it be confirmed by them.

6 Bac. 743.

§ 100. A *modus* may be prescribed for, without producing the deed by which it was created: for, wherever

Grant's Case,
11 Rep. 19.
2 P. Wms.
573.

wherever there has been a constant annual payment for time immemorial, it shall be intended, that such payment had a proper commencement.

Real Com-
position.
Gwill. 801.

§ 101. A real composition is, where an agreement is made between the owner of lands and the parson or vicar, with the consent of the patron and ordinary; that his lands shall in future be freed from the payment of all tithes, in consideration of some land, or other real recompence to the parson or vicar, in lieu and satisfaction of such tithe.

§ 102. This kind of composition was formerly permitted, because it was supposed that the clergy would be no losers by such composition; as the consent of the ordinary, whose duty it was to take care of the church in general, and of the patron, whose interest it was to protect that particular church, were both required to render the composition effectual.

Heathcote v.
Mainwaring,
Gwill. 1345.

Sawbridge
v. Benton,
Anstr. 372.

§ 103. Formerly, it was held, that a composition real could not be established, without shewing the deed by which it was created, or proving the actual existence of such a deed. But it is laid down in a modern case, that, where there has been a composition real within time of memory, its commencement must be shewn; though it is not necessary to produce the deeds under which it took place. Presumptions are admitted in this as in other cases; and the existence of such deeds may be inferred from other evidences. It is not necessary, that the consent of all the parties should be by the same deed: this may frequently not happen. In the case of the

the king, who consents by letters patent, it never can take place ; but a composition real is not supported by Anfr.R. 375. evidence of immemorial payment.

§ 104. No composition real can be good, unless it was made before the 13 *Eliz.* : for, by a statute passed in that year, chap. 10., it is enacted, that no parson or vicar shall make any conveyance of the estates of their churches, other than for three lives or thirty-one years.

§ 105. There have been several decrees made in courts of equity, to confirm compositions entered into by the consent of the parson, patron, and ordinary, subsequent to the statute 13 *Eliz.* ; but still these compositions are not held binding against the succeeding incumbents. Will.R. 128. Atty. Gen. v. Cholmley, 3 Gwill. 914.

§ 106. In many of the modern inclosure acts, the lands inclosed are for ever exempted from the payment of tithes ; and a portion of land is allotted to the parson and his successors as a glebe, in lieu of them. In other acts of this kind, a corn-rent is substituted in lieu of tithes. Inclosure Acts.

TITLE XXIII.

COMMON.

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| <p>§ 1. <i>Nature of.</i>
 2. <i>Common of Pasture.</i>
 3. <i>Appendant.</i>
 8. <i>Appurtenant.</i>
 13. <i>Because of Vicinage.</i>
 18. <i>In gross.</i>
 21. <i>Stinted Commons.</i>
 25. <i>Common of Estovers.</i>
 31. <i>Common of Turbary.</i>
 34. <i>Common of Piscary.</i>
 35. <i>Apportionment of Common.</i></p> | <p>§ 38. <i>Rights of the Lord.</i>
 47. <i>Rights of the Commoners.</i>
 51. <i>Approvement of Common.</i>
 71. <i>Inclosure of Common.</i>
 75. <i>Extinguishment of Common.</i>
 76. <i>By Release.</i>
 77. <i>By unity of Possession.</i>
 86. <i>By Enfranchisement of Copyhold.</i>
 90. <i>Common may be revived.</i></p> |
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Section I.

Nature of.

COMMON is a right or privilege, which one or more persons have, to take or use some part or portion of that, which another person's lands, waters, woods, &c. produce. It is a right which commenced in some agreement between the lords and tenants, for some valuable purposes; which, being continued by use, is good, though there be no deed, or instrument in writing, to prove the original agreement.

Vide Tit. 31.

Common of Pasture.

Tit. 1. § 9.

§ 2. The most general and valuable kind of common is that of pasture; which is a right of feeding one's beasts in another's land: for, in those waste grounds, which are called commons, the property of the soil is generally in the lord of the manor.

This

This kind of common is either appendant, appurtenant, because of vicinage, or in gross.

§ 3. Common appendant is a right annexed to the possession of arable land; by which the owner of such arable land is intitled to feed his beasts on the wastes of the manor. Appendant.

The origin of this species of common is thus described by Lord Coke.—“ When a lord of a manor, 2 Inst. 85.
4 Rep. 37 a.
“ wherein was great waste grounds, did enfeof others
“ of some parcels of arable land, the feoffors *ad manutendum servitium socæ* should have common in the
“ said wastes of the lord, for two causes; 1st. As incident to the feoffment; for the feoffee could not
“ plough and manure his ground without beasts, and
“ they could not be sustained without pasture; and,
“ by consequence, the tenant should have common in
“ the wastes of the lord for his beasts, which do
“ plough and manure his tenancy, as appendant to his
“ tenancy; and this was the beginning of common
“ appendant. The second reason was for maintenance
“ and advancement of agriculture and tillage, which
“ was much favoured in law.”

§ 4. Common appendant must be time out of mind, so that it cannot now be created: and it is regularly appendant to arable land only. Yet it may be claimed as appendant to a manor, farm, or carve of land, though it contains pasture, meadow, and wood: for it will be presumed to have all been originally arable; but a prescription to have common appendant to a house, meadow, or pasture, is void. 1 Roll. Ab. 396.
4 Rep. 37 a. & b.

§ 5. Common

Emerson v.
Selby,
2 Ld. Raym.
1015.

§ 5. Common of pasture may be appendant to a cottage : for a cottage has at least a curtilage annexed to it ; nor is it deemed in law to be a cottage, unless there are four acres of land belonging to it.

1 Inst. 122 a.

§ 6. Common appendant can only be claimed for such cattle as are necessary to tillage ; such as horses and oxen to plough the land, and cows and sheep to compester or manure it.

1 Roll. Ab.
397, 8.

Bennet v.
Reeve,
4 Vin. Ab.
583.
Willes R.
227.
Benfon v.
Chester, 8
Term R. 396.

§ 7. Common appendant may, by usage, be limited to any certain number of cattle ; but, where there is no such usage, it is restrained to cattle *levant et couchant* upon the land, to which the right is appendant : and the number of cattle, which are allowed to be *levant et couchant* on the land, shall be ascertained by the number of cattle, which can be maintained on the land during the winter.

Appurtenant.
1 Inst. 122 a.

1 Roll. Ab.
399.

§ 8. Common appurtenant does not arise from any connexion of tenure, but must be claimed by grant or prescription, and may be annexed to lands lying in different manors from those, in which it is claimed. This species of common, though frequently confounded with common appendant, differs from it in many circumstances. It may be created by grant ; whereas common appendant can only arise from prescription. . It may be claimed, as annexed to any kind of land ; whereas common appendant can only be claimed, on account of ancient arable land. It may be not only for beasts usually commonable, such as horses,

horses, oxen, and sheep; but likewise for goats, swine, &c.

§ 9. The right of this kind of common is restrained to cattle, *levant et couchant* on the land to which it is appurtenant: and therefore, if a person claims common by prescription for all manner of commonable cattle on the land of another, as belonging to a tenement; this is a void prescription, because he doth not say that it is for cattle, *levant et couchant* on the land.

1 Roll. Ab.
398.

Stevens v.
Austin,
2 Mod. 185.

§ 10. It has been determined in a modern case, that common for cattle, *levant et couchant*, cannot be claimed by prescription as appurtenant to a house, without any curtilage, or land. And Mr. Justice Buller said, the only question was, what was meant in former cases by the words “messuage” and “cottage,” annexed to which, was the right of common claimed. For, in all of them, the court said, they would intend that land was included therein: and, that it was necessary there should be some land annexed to the house, was clear, from considering what was meant by levancy and couchancy: it meant the possession of such land as would keep the cattle claimed to be commoned during the winter; and, as many as the land would maintain during the winter, so many should be said to be *levant et couchant*.

Scholes v.
Hargreaves,
5 Term Rep.
46.

§ 11. Persons, entitled to common appendant or appurtenant, cannot, in general, use the common but with their own cattle. If, however, they take the cattle of a stranger, and keep them on their own land, being

1 Roll. Ab.
398.

there *levant et couchant*, they may use the common with such cattle: for they have a special property in them.

§ 12. Common, appendant or appurtenant for all beasts *levant et couchant*, cannot be granted over; but common, appurtenant for a limited number of beasts, may be granted over: and it is said, that, in a case of this kind, the commoner may grant over part of the right of common, and reserve the rest to himself.

Drury v.
Kent,
Cro. Jac. 14.
W. Jones,
375.

§ 13. Common, because of vicinage, is, where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This species of common is, in fact, only a permissive right, intended to excuse what, in strictness, is a trespass in both, and to prevent a multiplicity of suits. It can only exist between two townships, or manors, adjoining one another, and not where there is intermediate land.

Because of
Vicinage.

1 Inst. 122 a.

11 Mod. 72.

4 Rep. 38 a.

§ 14. Common, because of vicinage, is not common appendant; but, inasmuch as it ought to be by prescription, from time immemorial, as common appendant ought, it is, in this respect, resembled to common appendant.

1 Inst. 122 a.

§ 15. This right of common does not authorize an inhabitant of one township, or manor, to put his cattle upon the wastes of the other township or manor; but
he

he must put them upon the wastes of his own township or manor, from whence they may escape into the wastes of the other.

§ 16. Common, because of vicinage, can only be used by cattle, *levant et couchant* on the lands, to which such right of common is annexed: and, if the commons of the towns of *A.* and *B.* are adjoining, and there are 50 acres of common in the town of *A.* and 100 acres in the town of *B.*, the inhabitants of the town of *A.* cannot put more cattle on their common than it will feed, without any respect to the extent of the common in the town of *B.* *nec é converso.* Corbet's Case, 7 Rep. 5.

§ 17. Lord Coke says, that, in the case of common *pur cause de vicinage*, one may inclose against the other: and, in 27 Eliz., it was resolved, that, where two lords of two several manors had two wastes, adjoining parcels of their manors, without inclosure, but the bounds of each were well known; in which wastes, the tenants of each manor had reciprocally common for cause of vicinage, one might inclose against the other. 1 Inst. 122 a. Smith v. How, 4 Rep. 38 b.

§ 18. Common in gross is a right, which must be claimed by deed or prescription, and has no relation to land, but is annexed to a man's person. It may be either for a certain, or for an indefinite, number of cattle. In Gross.

§ 19. Neither common appendant, nor common appurtenant, for cattle which are *levant and couchant*, 1 Roll. Ab. 401, 2.

can be turned into common in grofs. But common appurtenant, for a limited number of cattle, may be granted over ; and, by fuch grant, becomes common in grofs.

2 Roll. Ab.
402.

§ 20. Where a perfon has a common in grofs, either for a certain, or for an indefinite number of cattle, he may put in the cattle of a ftranger, and ufe the common with them.

Stinted Commons.
1 Roll. Ab.
397.

§ 21. In many cafes, the right to common of paf-
ture is confined to a particular part of the year only ;
as from *Michaelmas* to *Lady Day* ; in which cafe, it is
called a *Stinted Common*.

Hawkes v.
Molyneux,
1 Leon. 73.

§ 22. In a cafe where a man prefcribed to have
common appendant, *viz.* if the land was fown by con-
fent of the commoner, then he was to have no com-
mon till the corn was cut, and then to have common
again till the land was fown by the like confent of
the commoner ; it was objected, that this prefcription
was againft common right : for it was to prevent a man
from fowing his own land without the leave of another.
But the whole court held the prefcription good ; for
the owner of the land cannot plough and fow it, where
another has the benefit of common : but, in this cafe,
both parties had a benefit, for each of them had a
qualified interest in the land.

1 Roll. Ab.
397.

§ 23. A perfon may have a right of common in a
meadow, after the hay is carried, till *Candlemas* ; or,

to common in a pasture from the feast of *St. Augustin* till *All Saints*.

§ 24. By the statute 13 *Geo. 3. c. 81. f. 16, 17, 18.* it is enacted, that assessments may be made for the improvement of such commons, and that the time of opening and shutting them may be varied by the major part, in number and value, of the owners and occupiers of such common, with the consent of the lord or lady of the manor. And commons, which were formerly open during the whole year, may be shut and unstocked for a time, reserving a portion for such of the commoners as may dissent.

§ 25. Common of estovers is a right of taking necessary housebote, ploughbote, and hedgebote, in another person's woods or hedges, without waiting for any assignment thereof.

Common of Estovers.

We have seen, that every tenant for life or years has a liberty of this kind, of common right in the lands which he holds, without any express provision of the parties : but this right may also be appendant or appurtenant to a messuage or dwelling-house, by prescription, or by grant, to be exercised in lands not occupied by the tenant of the house : as, if a man grants estovers to another for the repair of a certain house; this right becomes appurtenant to that house; so that, whoever afterwards acquires it, shall have such common of estovers.

Tit. 3. f. 10.

Plowd. 381.

Arundel v.

Steer,

Cro. Jac. 25.

§ 26. A person prescribed to have estovers for repairing houses, or for building new houses on the land: it was alleged, that the custom was unreasonable to take estovers for the building of new houses: all the court, except *Williams*, held it to be a good prescription, for one might grant such estovers at that day. *Williams* held the prescription bad, as it ought only to be for repair of ancient houses.

5 Rep. 25 a.

§ 27. Where a person has common of estovers in a certain wood of another, by view and delivery of the owner's bailiff; if he take estovers without such view and delivery, he is a trespasser, although he takes less than he was entitled to.

4 Rep. 87 a.

§ 28. Where a person has common of estovers, either by grant or prescription, annexed to his house, although he alters the rooms and chambers, or builds new chimnies, or adds to the house, yet the prescription continues: but he cannot employ any of the estovers in the parts newly added.

Cro. Eliz.

820.

Cro. Jac. 256.

§ 29. Where a person has common of estovers, and the owner of the soil cuts down part of the wood, the person entitled to estovers cannot take any part of the timber thus cut down, but must take his estovers out of the residue.

Plowd. 381.

§ 30. Where a person has common of estovers appurtenant to a house, and he grants the estovers to another, reserving the house to himself; or, the house to another, reserving the estovers to himself, the estovers shall

shall not be thereby severed from the house; because they must be spent on the house.

§ 31. Common of turbary is a right to dig turf upon another's land, or upon the lord's waste. This kind of common can only be appendant to a house, and not to land: for turfs are to be burned in a house; nor can it extend to a right to dig turf for sale.

Common of
Turbary.
4 Rep. 37 a.

§ 32. In an action of trespass *quare clausum fregit*, *et solum fodit*, the defendant justified that he and his ancestors, and all those, whose estate he had in a certain cottage, had used to have common of turbary to dig and sell *ad libitum*, as belonging to the said cottage.

Valentine v.
Penny,
Noy 145,

It was adjudged, that this was a bad plea; such a right of common being repugnant in itself: for a common, appertaining to a house, ought to be spent in the house, and not sold abroad; and judgment was given accordingly.

§ 33. Where common of turbary is appurtenant to a house, it will pass by a grant of such house, *cum pertinentiis*.

Solme v.
Bullock,
3 Lev. 165.

§ 34. Common of piscary is a right to fish in the soil of another, or in a river running through another's land. And Lord Coke says, that *communio piscaria* does not exclude the owner of the soil from fishing.

Common of
Piscary.
1 Inst. 122 a.
n. 7.
Vide Tit. 27.

Apportion-
ment of Com-
mon.
Anon. Hob.
235.

§ 35. Common of pasture, whether appendant or appurtenant, may be apportioned upon the alienation of the land, to which such common belongs.

Wild's Case,
8 Rep. 78.

§ 36. *Wyat Wyld*, being seised of a messuage and 40 acres of land at *Croydon*, to which a right of common of pasture was appurtenant on 200 acres of land at *Norwood* for all commonable cattle, levant and couchant on the said messuage and 40 acres of land, enfeoffed *John Wood* of five acres thereof. The question was, whether *Wood* was entitled to common appurtenant to his five acres: and it was resolved that he was; and that the alienation of part of the land should not destroy the right of common, either of the alienor or alienee, but each shall retain a right of common proportioned to their estates.

So, if a person, having a right of common appurtenant to his land, leases part of the land to another, the lessor shall have common for beasts levant and couchant on the land leased.

1 Inst. 164 b.

§ 37. Common of estovers or piscary cannot be apportioned; and, therefore, Lord *Coke* says, that if a person has house-bote, hay-bote, &c. appendant to his freehold, they are so entire, that they shall not be divided.

Rights of
the Lord.

§ 38. With respect to the several rights of the lord and of the commoners in the common, it is held, that the lord of the manor or owner of the soil, in which there is a right of common, has the freehold and inheritance

heritance of the land ; and the commoner has only a special and limited interest in the soil, amounting only to a right to feed his cattle, cut timber, dig turf, &c. in it.

§ 39. Lord *Coke* says, that, if a man claim by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture, estovers, or the like, this is a prescription or custom against law, to exclude the owner of the soil : for it is against the nature of the word common ; and it was implied in the first grant, that the owner of the soil should take his reasonable profit there. But a man may prescribe or allege a custom to have and enjoy *solum vesturam* from such a day till such a day, and hereby the owner of the soil shall be excluded to pasture or feed there ; and so he may have *separacem pasturam*, and exclude the owner of the soil from feeding there.

1 Inst. 122 a.

2 Roll. Ab.
267.

§ 40. In a case which arose in 23 *Cha.* 2. it was resolved, that the copyholders of a manor may have the sole and several pasture for the whole year in the lord's soil, as belonging to their customary tenements : for this does not exclude the lord from all the profits of the land, as he is entitled to the mines, quarries, and trees.

Hoskins v.
Robins,
2 Saund. 324.
Vide
1 Saund. 353.
n. 2.

§ 41. It is laid down by Mr. Justice *Buller*, that where there are two distinct rights claimed by different parties, which encroach on each other in the enjoyment of them, the question is, which of the two rights

5 Term Rep.
416.

is subservient to the other. It may be either the lord's right which is subservient to the commoners, or the commoners which is subservient to the lord's. In general, the lord's is the superior right; because the property of the soil is in him: but, if the custom shew, that it is subservient to the commoners, then he cannot use the common beyond that extent.

Smith v.
Feverell,
2 Mod. 6.

§ 42. The lord, by prescription, may agist the cattle of a stranger on the common, but not otherwise. And, in a modern case, it seems to have been held, that a licence from the lord to a stranger, to put his cattle upon the common, is good; provided there be sufficient common left for the commoners.

§ 43. A lord of a manor may dig clay pits on the common, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right has always been exercised by the lord.

Bateson v.
Green,
5 Term Rep.
411.

§ 44. A commoner brought an action against the lessees of the lord, for digging clay upon the common. It appeared, that the herbage of the common was in many places destroyed by this practice; but it also appeared, that clay had been dug by the lord on the common for 70 years preceding, and had been sold by him during that time.

The jury found a verdict for the plaintiff; but a new trial was granted: and Lord *Kenyon* observed, that the only question was, whether the evidence supported the verdict for the plaintiff, and he was clearly of opinion that

that it did not. It appeared, that a few acres of the common had been rendered unproductive to the commoner; but the right of digging for clay in the common was incontestably proved to have existed at all times in the lord; and no witness had stated in what respect this right had been more exercised latterly than formerly. That such a right, as the lord had here exercised, might exist in point of law, could not be doubted: for, if the lord had always dug on the common, and taken what clay he pleased, without interruption or complaint, (and nothing appeared to shew that this right was limited to any particular extent), there was no pretence for subjecting him, or those who claimed under him, to such an action; although the commoners had been abridged of their enjoyment of some part of the common.

§ 45. On an application to the Court of Chancery by the tenants of a manor, for an injunction against the lessee of the manor to stay his digging of brick-earth, and making bricks on the common; Lord Chancellor *King*, assisted by Sir *Joseph Jekyll*, denied the motion; for that the lord was, of common right, entitled to the soil of the waste, and the tenants had only a right to take the herbage by the mouth of their cattle. That the lord has a right to open mines in the waste of a manor, and why not to dig brick-earth? especially, where the bricks were made for one of the tenants of the manor, and to be employed in building upon the manor.

— v.
Palmer,
5 Vin. Ab. 7.

Folkard v.
Hemmett,
5 Term Rep.
417. n.

§ 46. The lord may, with the consent of the homage, grant part of the soil of the common for building; if such a right has been immemorially exercised.

Rights of the
Commoners.

§ 47. With respect to the rights of commoners in cases of common of pasture, it is settled, that they have nothing to do with the soil, but only a right to take the grass with the mouths of their cattle; and, therefore, it has been held, that a commoner cannot make a trench or ditch on the common, to let off the water, unless there is a custom to authorize him.

1 Roll. Ab.
406.

Bellew v.
Langdon,
Cro. Eliz.
376.

§ 48. Rabbits are beasts of warren, which a commoner cannot justify killing or driving away, for they are not vermin: and, therefore, the keeping of them by the owner of the soil is lawful.

Hadesdon v.
Gryffell,
Cro. Jac. 195.

§ 49. If the lord makes rabbit burrows in the common, and stores them with rabbits, the commoners cannot justify killing them: for a commoner has nothing to do with the land, but to put in his cattle; and he may not meddle with any thing of the lord's there.

Cooper v.
Marshall,
1 Burr. 259.

§ 50. A commoner cannot fill up rabbit burrows, made by the lord in the common; but, if his rights are injured by them, his remedy is by action.

Approvement
of Common.
2 Inst. 85.

§ 51. By the common law, a lord of a manor could not appropriate to himself, by inclosure or otherwise,
any

any part of his wastes, in which his tenants had formerly enjoyed any right of common; because the common issued out of the whole waste, and every part thereof.

§ 52. This inconvenience produced an article in the statute of *Merton*, 20 Hen. 3. c. 4. by which it was enacted, that, when any of the tenants of a manor brought an assize of novel disseisin for their common of pasture, and it was therein recognized by the justices, that they had as much pasture as sufficed to their tenements, and that they had free egress and regress from their tenements unto the pasture, they should be contented therewith; and they, of whom it was complained, should go quit of as much as they had made their profit of their lands, wastes, woods, and pastures. And, if they alleged that they had not sufficient pasture or sufficient ingress and egress according to their hold, then the truth thereof was to be enquired into by assize: and if it was found as alleged, then they were to recover their seisin by view of the inquest; and the disseisors were to be amerced as in other cases.

§ 53. This statute extended only to common appendant; but by the statute of *Westminster* 2. c. 46. it is enacted, that the statute of *Merton* shall bind neighbours, and such as claim common of pasture appurtenant to their tenements, but not such as claim common by special grant or feoffment for a certain number or otherwise,

4 Inst. 442.

2 Inst. 474.

§ 54. Lord *Coke* observes, that the word *vicinus* in this act is taken for a neighbour, though he dwell in another town, so the towns and commons be adjoining to each other. And, if the lord hath the common in the tenant's ground, the tenant may approve within this act; for there the lord is *vicinus*.

§ 55. This statute also provides that, by occasion of windmills, sheep-cotes, dairies, enlarging of a court, necessary curtilage, none shall be grieved by assize of novel disseisin for common of pasture.

4 Inst. 476.

§ 56. Lord *Coke* observes, that, by this clause, five kinds of improvement are expressed, that may be done between lord and tenant, and neighbour and neighbour, without leaving sufficient common to those who had it: any thing in this statute, or in the statute of *Merton* to the contrary; and that these five are put for examples, for the lord may erect a house for the dwelling of a beast-keeper to take care of the beasts, as well of the lord as of the commoners, and yet it is not within the letter of this law,

Id.

§ 57. His Lordship farther observes, on the word "necessary," that it shall not be taken according to the quantity of the freehold he hath there, but according to his person, estate, or degree, and for his necessary dwelling and abode. For if he have no freehold in that town, but his house only, yet may he make a necessary enlargement of his curtilage.

§ 58. In a subsequent case, it was held, that the lord cannot erect a house within the statute of *Merton*, unless it be for his own habitation or his shepherds: and he must allege, that he built it for one of these purposes; for, otherwise, he may build a great house to let to a nobleman, which may require a greater curtilage than the lord or his herdsman.

Nevil v.
Hammerton,
Sid. 79.

§ 59. Lord *Coke* observes, that throughout all the statute of *Merton*, the words are *pastura et communia pasturæ*; so that it does not extend to common of piscary, turbary, or estovers, or the like: and, in a modern case, it was held that the lord has no right under the statute of *Merton* to inclose and approve the wastes of a manor, where the tenants have a right to dig gravel on the waste, or to take estovers there.

Duberley v.
Page, 2 Term
R. 39.

§ 60. By the statute 3 and 4 *Edw. 6. c. 3.*, the statutes of *Merton* and *Westminster* are confirmed: and it is further enacted, that where judgment is given for the plaintiffs, in an assize upon any branch of the said statutes of *Merton* and *Westminster 2.*, the court shall award treble damages.

§ 61. It was formerly doubted, whether, in the case of common appurtenant without number, the lord might approve: for, not being admeasurable, it was not approveable; because, the common being without number, sufficiency could not be proved. *Dyer* and *Manwood* held that, although the common were without number, yet it might be reduced to a certainty, being by prescription: as the number of cattle, which

Anon. 4.
Leon. 41.

the best and most substantial tenant of the said tene-
ment at any time within the memory of man had kept
upon the waste. And then the lord might approve,
leaving sufficient common according to such rate.

Fawcett v.
Strickland,
Com. Rep.
577.
6 Term Rep.
747.
Ante § 59.

§ 62. It is laid down by Lord Chief Justice *Willers*,
and the other judges of the court of common pleas,
that, although a lord of a manor cannot, by virtue of
the statute of *Merton*, inclose and approve against com-
mon of turbary; yet, that where there is common of
pasture and common of turbary in the same waste,
the common of turbary will not hinder the lord from
inclosing against the common of pasture; for they are
two distinct rights.

2 Term R.
391, 392 n.

§ 63. Although the custom of a manor authorizes
the commoners to inclose a part of the waste under
certain circumstances; yet this does not take away the
lord's right of approving under the statute of *Merton*,
provided he leave common sufficient for the tenants.

Clarkson v.
Woodhouse,
5 Term R.
412 n.

§ 64. In a modern case, the court of king's bench
held, that a custom, authorising the owners of ancient
messuages within a manor to have certain portions of
the common called moss dales assigned to them in se-
veralty, for digging turves, and after clearing them of
turves, to approve them, and hold them in severalty
discharged from all right of common, was good in
law.

Shakespeare v.
Peppin,
6 Term R.
741.

§ 65. Where commoners have some other right on
the common, beside that of pasture, as of digging
sand,

land, &c., the lord may, notwithstanding, approve, if he leave sufficient common of pasture, and if such inclosure be no interruption to the enjoyment of the other kind of common.

§ 66. Although the statutes of *Merton* and *Westminster* speak of the lords of manors, as the only persons enabled to approve of commons; yet it has been determined in a modern case, that any person, who is seised in fee of a waste within a manor, may approve, leaving a sufficiency of common: for otherwise not half the wastes in the kingdom could be approved; as many of the places, that are called manors, would not be found such in point of law, if the matter were strictly examined. And Lord *Kenyon* observed, that, though in the statutes of *Merton* and *Westminster* 2, only the lord is mentioned, yet in those days there was a paucity of expression in acts of parliament; and the lord of the manor is put as the owner of the soil, where they stand in the same predicament: and a contrary decision would be ruinous indeed, and extremely prejudicial to the public.

Glover v.
Lane,
3 Term R.
445.

Tit. 1. § 13.

§ 67. The court of chancery will assist and protect a lord of a manor, in approving a common under the statute of *Merton*.

§ 68. There having been an inclosure made out of a common, and young wood and timber growing thereon, and the plaintiff insisting that it was an improvement within the statutes of *Merton* and *Westminster* 2.; the court thought fit to continue the injunction, and directed a trial to be had at the next assizes,

Weekes v.
Slake,
2 Vern. 301.

affizes, whether sufficient common was left for the tenants.

Arthington v.
Fawkes,
2 Vern. 356.

§ 69. The lord of a manor having inclosed part of a common, and the tenants by force throwing open the inclosures, brought his bill to quiet him in possession; surmising he had only improved according to the statute of *Merton*, and had left a sufficiency of common; but that some of the defendants, although they pretended to have a right, were not intitled to intercommon upon the waste in question.

Upon the hearing, two issues were directed to be tried at law: 1st, as to some of the defendants, whether they had a right of common; then 2dly, whether there was sufficient common left, beyond what was inclosed. And the injunction was continued in the mean time, although it was a new inclosure, and made not above two years before the bill exhibited.

——— v.
Palmer,
5 Vin. Ab. 7.

§ 70. Upon a bill, brought in chancery by the tenants of a manor against the lessee of the lord, to establish their right of common of pasture, and for an injunction against the defendant for inclosing part of the common; Lord C. King, assisted by Sir J. Jekyll, denied the motion: for, by the statute of *Merton*, the lord might inclose part of the waste, leaving sufficient common. That at common law, in an action brought against the lord, the tenant must alledge in the declaration, that there is not sufficient common left; or he cannot maintain the action: and, if that should be the case, the tenants might have their remedy at common law,

law, and it was too soon for an injunction before answer.

§ 71. The inclosure of commons having been found to be extremely beneficial to the public, by increasing tillage and agriculture, it was enacted by the statute 29 Geo. 2. c. 36. § 1. That his Majesty, his heirs and successors, and all other owners of wastes, woods, and pastures, wherein any persons or bodies politic have right of common of pasture, by and with the assent of the major part in number and value of the owners and occupiers of the tenements to which such right of pasture doth belong, and to and for the major part in number and value of the owners and occupiers of such tenements, by and with the assent of the owner or owners of the said wastes, woods, and pastures, and to and for any other person or persons or bodies politic, by and with the assent and grant of the owner or owners of such wastes, woods, and pastures, and the major part in number and value of the owners and occupiers of such tenements, may inclose, for the growth and preservation of timber and underwood, any part of such wastes, woods and pastures.

Inclosure of Commons.

§ 72. By the stat. 31 Geo. 2. c. 41. it is provided, that if any recompence be agreed to be given for such inclosure, it shall be made to the persons interested in the right of common, in proportion to their respective interests; and not to the overseers of the poor as was directed by the second section of the preceding act: and the powers given to owners by that act may be exercised by tenants for life or years, during their

respective interests, with a proviso that nothing done by them shall have effect after the determination of their estates.

§ 73. By the statute 13 Geo. 3: c. 81. § 15. lords of manors, with the consent of three fourths of the persons having right of common, are enabled to lease for four years any part of the said commons, not exceeding a twelfth part thereof; and to apply the rent in draining, fencing, or otherwise improving the residue of the said wastes.

§ 74. The inclosure of commons is now usually effected by means of private acts of parliament; of which an account will be given in a subsequent title.

Extinguishment of
Common.

§ 75. A right of common may be extinguished by a release, or by unity of possession of the land.

By Release.

Rotheram v.
Green,
Cro. Eliz.
593.
1 Show. 350.

§ 76. With respect to a release of common, it has been determined that, if the commoner releases part of the common, it will operate as an extinguishment of the right of common in the whole; because the right of common is entire throughout the whole land: and, therefore, a release of part is a release of the whole.

By Unity of
Possession.

4 Rep. 38 a.

§ 77. Common appendant and appurtenant become extinguished by unity of the land, to which the right of common is annexed, with the land in which the common was: for, where a man has as high and perdurable an estate in the land, as in a rent common or other

other profit issuing out of the same land, there the rent common and profit is extinct.

§ 78. In trespass for breaking his close in *Abney*, the defendant pleaded that long before, *Ec.* one *Bradshaw* was seised of the place where; *Ec.* in fee; and that one *Fuljamb* was seised in fee of a house and twenty acres of land in *Abney* aforesaid, and that the said *Fuljamb*, and all they whose estate, *Ec.* had common in the said place where *Ec.*; and that the said *Fuljamb*, enfeoffed of the said tenement the said *Bradshaw*, and that afterwards the said *Bradshaw* let unto the defendant the said house, and twenty acres of land, with *all commons, profits, and commodities thereto appertaining or used with the said messuage*; and thereby justifies putting in his cattle to use the common, *Ec.*

Bradshaw v. Eyre,
Cro. Eliz.
570.

It was therefore demurred; and it was held clearly that his common was extinguished by the unity of possession, and could not be revived again: and *Gawdy Just.* said it was the same of common appendant.

§ 79. Where the abbot of *D.* was seised of a common out of the abbey of *S.* as appurtenant to certain lands of the abbey of *D.*: afterwards both those abbeys were dissolved, and the possession of both were given to the king, to hold in as ample a manner as the abbots held them. Afterwards, the king granted the lands of one abbey to *A.* and of the other abbey to *B.* It was determined that the words “in as ample a manner” *Ec.* were to be construed according to law, and

Nelson's Case,
3 Leon. 128.

no further; and that the unity of possession in the king had extinguished the common.

§ 80. To constitute such an unity of possession, as will extinguish a right of common, the person must have an estate in the lands to which the common is annexed, and in those, where the right of common exists, equal in duration and all other circumstances of right.

Rex v. Inhabitants of Hermitage, Carth. 239.

§ 81. A right of common was appendant to certain tenements, which were parcel of the abbey of *Sarum*, in a common, that was parcel of the dutchy of *Cornwall*: Upon the dissolution of the abbey of *Sarum*, these tenements became vested in king *Hen. 8.* in fee; in whom the dutchy of *Cornwall* was then vested for want of a duke of *Cornwall*. It was resolved by Lord Chief Justice *Holt*, and the rest of the judges, that this was not such an unity of possession as would destroy the right of common; because king *Henry 8.* had not as perdurable an estate in the one as in the other. For, in the dutchy of *Cornwall* the king had only a fee, determinable on the birth of a duke of *Cornwall*, which was a base fee; but, in the tenements in *Hermitage*, he had a pure fee-simple, indeterminate *jure coronæ*.

Anon. Godb. 4.

§ 82. A parson had common appendant to his parsonage in the lands of an abbey; and afterwards the abbot had the parsonage appropriated to him and his successors. By *Windham* and *Meade contra Dyer*, the abbot had not as perdurable an estate in the one as in the

the

the other : for the parsonage might be disappropriated; and then the parson would have the common again.

§ 83. J. S. was seised of 100 acres of land, and had common appurtenant in 46 acres, two of which were in the occupation of A. and the other 44 of B.; and he purchased the two acres in the occupation of A. It was resolved that the whole right of common was extinct by this purchase.

Kimpton's
Cas.
Goldf 53.
Cro. Eliz.
594.

§ 84. Where the lord approves a part of the waste, and afterwards one of the commoners purchases the part so approved, this will not extinguish his right of common; because, by the approvement, the land was utterly discharged of common.

Dyer 339. pl.
45.
Cro. Eliz. 594.

§ 85. Where a person, having common appurtenant, takes a lease, for life or years, of part of the land in which he has such right of common; all his common shall be suspended during the continuance of such lease: because it is the folly of the commoner to intermeddle with the land, over which he has the right of common.

8 Rep. 79 a.
9 Rep. 135 a.

§ 86. Where a right of common is annexed to a copyhold estate, and the lord grants and confirms the land to the copyholder and his heirs, *cum pertinentiis*, the common is extinguished, because it was annexed to the customary estate; which, being destroyed and converted into a freehold, the right of common is extinguished: and the words "*cum pertinentiis*" will not have the effect of continuing it; because this right of

By Enfranchisement of
Copyhold,
Gilb. Ten.
224.
Marshall v.
Hunter,
Cro. Jac. 253.
Tit. 10. c. 6.
§ 6.
Forth v.
Ward,
Cro. Jac. 253.
Moore 667.

common

common was not appurtenant to the freehold estate, granted by the lord.

*Styant v.
Walker,
2 Vern. 250.*

§ 87. This doctrine, however, appears not to be allowed in equity : for, where the lord of a manor enfranchised a copyhold, with all common thereto belonging or appertaining, and afterwards bought in all the copyholds, and then disputed the right of common with the copyholder he had enfranchised, and at law recovered against the plaintiff, because the prescription of common to the copyhold was destroyed by the enfranchisement ; and the grant of the copyhold, with the common thereto belonging, gave no right of common ; because, when enfranchised, no common in point of law belonged to it : The court decreed, that the plaintiff should hold and enjoy against the defendant the same right of common, which belonged to the copyhold, and costs.

*1 Salk. 366.
6 Mod. 20.*

§ 88. But, where a copyholder claims common out of the manor, it belongs to the land and not to the estate in the land : and, therefore, an enfranchisement of the copyhold will not extinguish the common.

§ 89. So, if a copyholder of one manor has common in the wastes of another manor, he must prescribe in the name of his lord, and say that the lord of the manor, whereof he is copyholder, used time out of mind to have common for him and his copyholders : and there enfranchisement of copyhold does not extinguish the common ; for it is a derivative right, which the copyholder has : and so, if it be taken as appendant to land, enfranchisement will not extinguish it.

§ 90. A common,

§ 90. A common, which has been extinguished by unity of possession, may be revived by a new grant. Common may be revived.

§ 91. Thus, in the case of *Bradshaw v. Eyre*, the court held, that the words of the lease "all commons, profits, &c. occupied or used with the said messuage," &c. operated as a grant of a new right of common for the time; for, although it was not common in the purchaser's hands, yet it was *quasi* common, used therewith; and, though not the same common, as was used before, yet it was the like common. Ante, f. 78.

§ 92. Where common appurtenant to a messuage, was extinguished by unity of possession in the lord's hands; it was held, that a grant by the lord of the messuage with all common appurtenant did not pass the common extinct; but, that a grant of all commons, usually occupied with the said messuage, would have passed such common as the first was. Sandys v. Oliff, Mo. 467. Grymes v. Peacock, Bull. 17. 2 Brownl. 222.

§ 93. Where a copyhold messuage, to which common in the lord's demesnes belonged, escheated to the lord; who granted it with all commons thereto belonging, or used therewith: It was adjudged, that this enured as a new grant of the common. Worledge v. Kingfwell, Cro. Eliz. 794.

§ 94. Where a person had common in gross, which was derived from the abbot of *W.* and was destroyed by unity of possession in the crown, with the lands in which the common was; and the crown granted the lands, to which the common belonged, with the words *et, tanta, talia, libertates, privilegia,* Sawyer's Case, W. Jo. 285.

et francis' &c. quos &c. aliquis &c. It was resolved, that, being common in gross, it was not revived: for, in that case, every person, who had any part of those lands, should have as great common as the abbot had; and so the common would be infinitely surcharged. But, if such common had been appendant or appurtenant, it would have been revived: for no person would have common for more cattle, than were proportionable to his land.

TITLE XXIV.

W A Y S.

- | | |
|---|---|
| § 1. <i>Nature of a Right of Way.</i>
6. <i>How a Right of Way may be claimed.</i>
15. <i>How a Right of Way is to be used.</i> | § 22. <i>Who are bound to repair a Way.</i>
23. <i>How a Right of Way may be extinguished.</i> |
|---|---|

Section 1.

A RIGHT of way is the privilege which an individual, or a particular description of persons, such as the inhabitants of the village of *A.* or the owners or occupiers of the farm of *B.* may have of going over another person's grounds. It is an incorporeal hereditament of a real nature; and a way of this kind is entirely different from the king's highway, which leads from town to town, and also from common ways, which lead from a village into the fields.

Nature of a
Right of
Way.

§ 2. Lord *Coke* says, there are three kinds of ways : 1 Inst. 56 a
First, a footway, which is called *Iter quod est jus eundi vel ambulandi hominis*. The second is a footway and horseway, which is called *Actus ab agendo*; and this is vulgarly called a *Pack* and *Prime Way*; because it is both a footway, and a pack or drift-way also. The third is *via* or *aditus*, which contains the other two, and

and also a cartway, &c. for this is, *jus eundi, vehendi, et vehiculum et jumentum ducendi*; and this is twofold, viz. *Regia via*, the king's highway for all men, and *communis strata* belonging to a city or town, or between neighbours and neighbours.

1 Vent. 189.
1 Term Rep.
940.

§ 3. Notwithstanding these distinctions, it seems, that any of these ways which is common to all the king's subjects, whether it lead directly to a market town, or only from town to town, may properly be called a highway; and that any such cartway may also be called the king's highway. But a way to a parish church, or to the common fields of a town, or to a village, which terminates there, may be called a private way; because it does not belong to all the king's subjects, but only to the inhabitants of a particular parish, village, or house: and Lord Hale says, that whether it be a highway or not, depends much upon reputation.

Bro. Ab. Tit.
Prescrip. 91.
Jenk. Cent. 3.
94-

§ 4. It was held in 18 *Edw. 4.*, that a person may have a right of way to go through a churchyard; and it was said, in that case, that the churchyard of the charter-house was a common way for the inhabitants of London to St. John's.

6 Mod. 3.

§ 5. A person cannot claim a way over another's ground, from one part thereof to another: but he may claim a way over another's ground, from one part of his own ground to another part of it.

§ 6. A right

§ 6. A right of way over another person's ground may be claimed in three ways. First, by prescription and immemorial usage: as, where the inhabitants of a certain vill have, time out of mind, traversed a particular close or field to get at their parish church.

How a Right of Way may be claimed.
Vide Tit. 31.

§ 7. So a person may prescribe for a way from his house through a certain close, &c. to church, though he himself hath lands next adjoining to his house, through which of necessity he must first pass; for the general prescription shall be applied only to the lands of others.

Palm.R. 387.

§ 8. Secondly, by grant; as, where the owner of a piece of land grants to another a liberty of passing over his grounds in a particular direction, he thereby acquires a right of way over those grounds.

§ 9. It has been determined in a modern case, that where a person granted to another, "a free and convenient way, as well an horseway as a footway, as also for carts, waggons, wains, and other carriages whatsoever in, through, over, and along a certain slip of land, &c. leading between *Flemby* and *Netherball*, to carry stone, timber, coal, or other things whatsoever." The grantee had a right to lay a framed waggon-way along the slip of land for the purpose of carrying coals, it being the most convenient way of transporting them. But that the grantee was not justified in making transverse roads across the slip of land.

Senhouse v. Christian,
1 Term Rep.
560.

Campbell v.
Wilson,
3 East. R.
204.

§ 10. It has been held in a modern case, that an adverse enjoyment of a right of way for 20 years, and no evidence that it had been used by leave or favour, or under a mistake, was sufficient to leave to a jury to presume a grant.

Vide 1 Saund.
R. 323. n. 6.

§ 11. Thirdly, a person may claim a right of way over another's land from necessity: as, if *A.* grants a piece of land to *B.* which is surrounded by land belonging to *A.*, a right of way over *A.*'s. land passes of necessity to *B.*; for, otherwise, he could not derive any benefit from the land. And it is said in *Roll's Abridgement*, that the feoffor shall assign the way where he may best spare it. It is also said in *Roll*, that it is the same, if the close aliened be not totally inclosed by the land of the grantor; but partly with the land of strangers, for the grantee cannot go over the stranger's land. But there is a quere put to this last passage,

2 Roll. Ab.
60. pl. 17. 18.

Clark v.
Cogge,
Cro. Jac. 170.

§ 12. In trespass upon demurrer, the case was, a person sold lands, and afterwards the vendee, by reason thereof, claimed a way over the plaintiff's land, there being no other convenient way adjoining. And whether this was a lawful claim, was the question. It was resolved, without argument, that the way remained, and that he might well justify the using thereof; because it was a thing of necessity: for, otherwise, he could not have any profit of his land.

§ 13. It was held in the same case, that if a man hath four closes lying together, and sells three of them, reserving the middle close, and has no way thereto,
but

but through one of those which he sold, although he did not reserve any right of way, yet he shall have it, as reserved to him by law.

§ 14. In a modern case, it was determined by the Court of King's Bench, that where a person conveys land, merely as a trustee, to another, to which there is no access, but over the trustee's land, a right of way passes of necessity, as incident to the grant. And Lord *Kenyon* observed, that it was impossible to distinguish this from the general case, where a man grants a close surrounded by his own land, in which case, the grantee has a way to it, of necessity, over the land of the grantor; merely on the ground, that the plaintiff conveyed to the defendant in the character of a trustee: for it could not be intended that he meant to make a void grant; there being no other way to the defendant's close, but over the land of one of the persons who granted to him, he was intitled to such a way of necessity, upon the authority of all the cases, and the principle, that every deed must be taken most strongly against the grantor.

Howton v. Fearson,
8 Term Rep.
50.

§ 15. A right of way can only be used according to the intent of the grant, or the occasion from which it arises, but must not exceed it; and, therefore, if a person has a right of way over another's close to a particular place, he cannot justify going beyond that place.

How a Right
of Way is to
be used.

§ 16. In trespass for driving cattle over the plaintiff's ground, the case was, *A.* had a way over *B.*'s ground

Howell v. King,
1 Mod. Rep.
190.

to

to *Blackacre*, and drove his beasts over B's. ground to *Blackacre*, and then to another place beyond *Blackacre*; and whether this was lawful or not, was the question upon demurrer. It was urged, that when the defendant's beasts were at *Blackacre*, he might drive them whither he would. On the other side, it was said, that by this means, the defendant might purchase 100 or 1000 acres adjoining to *Blackacre*, to which he prescribed to have a way, by which means the plaintiff would lose the benefit of his land; and that a prescription presupposed a grant, and ought to be continued according to the intent of its original creation. To which the court agreed, and judgment was given for the plaintiff.

Lawton v.
Ward,
1 Ld. Ray. 75.

§ 17. The same point appears to have been determined in a subsequent case, in which *Powell*, Justice, observed, that the difference was, where he goes farther to a mill or a bridge, there it may be good; but when he goes to his own close, it is not good.

The Editor of the fourth edition of Lord *Raymond's Reports*, in a note upon this passage, expresses a doubt, whether this distinction be well founded, and says, "the true point to be considered upon such a case, should seem to be, *quo animo* the party went to the close; whether really and *bonâ fide* to do business there, or merely in his way to some distant place."

2 Comm. 36.

§ 18. Sir *William Blackstone* says, that by the law of the twelve tables, where a man had a right over another's

other's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased, which was the established rule in public as well as private ways: and that the law of *England*, in both cases, seems to correspond with the *Roman*.

§ 19. This position is supported by the following case.—In an action of trespass for destroying his close, the defendant pleaded, that, time out of mind, there was a common footpath through the close, &c. The plaintiff replied, that the defendant went in other places out of the way. The defendant rejoined, that the footpath was *adeo luteosa et funderosa*, in default of the plaintiff, who ought to amend it, that he could not pass along it, and therefore he went as near the path as he could, in good and passable way. And this was resolved to be a good plea and justification.

W. Jones,
296.

§ 20. It has, however, been resolved, in a modern case, that where a person has a right to a precise specific way over another's ground, which he is bound to repair, he cannot deviate from it, even though it should be overflowed by a river.

§ 21. In trespass for breaking and entering a close, the defendant pleaded a right of way by prescription, through a lane of the plaintiff's; that the tenants of the *locus in quo* were bound to repair; that the lane was overflowed with water, and that he necessarily went over the *locus in quo*. The plaintiff having traversed the

Taylor v.
Whitehead,
Doug. 745.

the prescription to repair, and the right of way, the jury found for the plaintiff as to the first plea respecting the repairs, and for the defendant, as to the second plea respecting the right of way.

The question on the validity of the last plea was argued.

Lord Mansfield.—"The question is upon the grant of this way. Now it is not laid to be a grant of a way, generally over the land, but of a precise specific way. The grantor says, you may go in this particular line: but I do not give you a right to go either on the right or left. I entirely agree with my brother *Walker*, that, by common law, he who has the use of a thing, ought to repair it. The grantor may bind himself, but here he has not done it. He has not undertaken to provide against the overflowing of the river, and, for ought that appears, that may have happened by the neglect of the defendants; highways are governed by a different principle; they are for the public service, and if the usual tract is impassable, it is for the general good that people should be entitled to pass in another line."

Buller, Justice.—"If this had been a way of necessity, the question would have required consideration; but it is not so pleaded. It does not appear that the defendant had no other road."

§ 22. It seems, that by the common law, where a person grants a right of way over his land to another, the grantee, and not the grantor, is bound to repair it. But the grantor of a private way may be bound, either by express stipulation, or prescription, to repair it. And, in a modern case, it was determined, that in an action on the case against the grantor of a private way, for neglecting to repair, it was sufficient to allege generally in the declaration, that he, by reason of his possession of the close in which the way is, ought to repair it: and the special matter of the obligation shall be given in evidence on the general issue.

Who are bound to repair a Way.
1 Sand. 322
a. n. 4.
Ante, f. 20.

Rider v. Smith,
3 Term Rep. 766.

§ 23. Where a person has a right of way over another's close, and he purchases such close, his right of way is extinguished by the unity of seisin. But there is a distinction between a right of way which is of necessity, and a right of way which is merely an easement: for, in the latter case, it is not extinct by unity of possession.

How a Right of Way may be extinguished.
1 Roll. Ab. 935.
Heigate v. Williams,
Noy 119.
Surry v. Pigot,
3 Bulst. 340.

§ 24. Thus, if a vill has a way to a church, and one of the vill purchases the land over which the way is, yet this unity shall not extinguish the way; because it is a thing of necessity.

1 Roll. Ab. 936.

§ 25. It is said, that where a right of way has been extinguished by unity of possession, it may be revived by severance.

Jenk. Cent.
1 Ca. 37.

Thus, upon a descent to two daughters, where land, over which there had been a right of way was allotted to one of them, and the land to which the right of way belonged was allotted to the other, it was held, that this allotment, without specialty to have the way antiently used, was sufficient to revive it.

Tit. Exting.

There is a case similar to this in *Brooke's Abridgement*, where it is doubted whether the partition did not create a new way.

§ 26. The doctrine of revival does not seem to have been admitted in the following modern case.

Whaley v.
Thompson,
1 Bos. & Pul.
371.

§ 27. *Thomas Adderley* being seised at the same time of two closes, over one of which a right of way had been immemorially used to the other, devised the close to which the right of way had been attached, with its appurtenances, to *A. B.*, and devised the other close to another person. *A. B.* claimed the right of way; and the court held, that from the moment when the possession of the two closes was united in one person, all subordinate rights and easements were extinguished. The only point, therefore, that could possibly be made in the case was, that the antient right, which existed while the possession was distinct, was merely suspended, and might revive again.

It was admitted, that the word appurtenances would carry an easement or legal right, but its operation must be confined to an old existing right; and if the right
of

of way had passed in this instance, it must have passed as a new easement; but the right of way being extinct, the word appurtenances had nothing to operate upon.

§ 28. Though a right of way be extinguished, yet, if it is used for thirty years after, this is sufficient to afford a presumption of a new grant, or licence, from the owner of the land.

Keymer v.
Summers,
Bull. N. P.
74.

TITLE XXV.

OFFICES.

- | | |
|---|--|
| <p>§ 1. <i>Nature of an Office.</i>
 6. <i>How created.</i>
 8. <i>Offices incident to others.</i>
 11. <i>How granted.</i>
 16. <i>Bishops, &c. may grant Offices.</i>
 21. <i>What Estate may be had in Offices.</i>
 35. <i>Reversionary Grants.</i>
 40. <i>What Offices may be intailed.</i>
 43. <i>What Offices are subject to Dower and Curtesy.</i>
 46. <i>Some Offices may be held by two Persons.</i>
 51. <i>What Offices may be assigned.</i></p> | <p>§ 54. <i>Who may hold Offices.</i>
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 89. <i>What Bargains not within the Statute.</i>
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 94. <i>How Offices may be lost.</i>
 95. <i>Forfeiture.</i>
 105. <i>Acceptance of an incompatible Office.</i>
 108. <i>Destruction of the Principal.</i></p> |
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Section I.

Nature of an
Office.

AN office is a right to exercise a public or private employment, and to take the fees and emoluments belonging to it: and all offices relating to land or exercisable within a particular district, are incorporeal hereditaments of a real nature, and are therefore classed under the general head of real property.

§ 2. Offices are either public or private, the first are those which concern the general administration of justice, or the collection of the public revenue. Such as the judges of the king's courts at *Westminster*, sheriffs, coroners, gaolers, &c. commissioners of the customs and excise, &c. The second are those which only

concern particular districts belonging to private individuals, such as stewards and bailiffs of manors.

§ 3. Offices are also either judicial or ministerial; the first relating to the administration of justice, and which must be exercised by persons of sufficient skill and experience in the duties of such offices.

The second are those where little more than attention and fidelity are required to the due discharge of them.

§ 4. Upon the establishment of the feudal law our kings frequently granted lands to their subjects reserving some honorary services, to be done by the grantees and their heirs, to the king himself; such as to carry his banner, or his sword, or to be his sewer, carver, or butler at his coronation.

Lit. f. 153.
1 Inst. 105 b.
107 b.

This was called tenure by grand serjeanty, and the right of performing these services was considered as an office of great honour; many of which still exist, and are claimed to be exercised at every coronation.

§ 5. There are nine great offices of the crown, the persons exercising them, who are usually called the great officers of state, have the titles of lord high steward, lord chancellor or keeper of the great seal, lord high treasurer, lord president of the council, lord privy seal, lord great chamberlain, lord high constable, earl marshal, and lord high admiral.

§ 6. All public offices must originally have been created by the sovereign as the fountain of government.

How created.

4 Inst. 75.

There are however a great number of offices, which having existed for time out of mind, are therefore said to be derived from immemorial usage: and Lord *Coke* says it is a rule in law, that antient offices must be granted in such form and manner, as they have used to be, unless the alteration be by authority of parliament.

2 Inst. 533.

§ 7. Lord *Coke* also says that in consequence of the statute 34 *Edw. 1. De Tallagio non imponendo*. The king cannot erect any new office, with new fees, for that is a talliage put upon the subject, which cannot be done without the assent of parliament. And this appeared by a petition in parliament 13 *Hen. 4.* in which the commons complained that an office was erected for measurage of clothes and canvas, with a new fee for the same, by colour of the king's letters patent, and prayed that those letters patent might be revoked; for that the king could erect no offices with new fees, to be taken of the people who may not be so charged but by parliament. And he observes that these letters patent were declared void in the court of king's bench and in parliament.

Offices incident to others.

3 Inst. 425.

§ 8. There are a great variety of offices incident to other offices of a superior kind, and grantable by those who hold the superior offices. Thus the lord chancellor or keeper of the great seal and chief justice of the king's courts at *Westminster*, have a right of granting several offices in their respective courts. And Lord *Coke* observes that the justices of the king's courts did ever appoint their clerks to inroll all pleas, pleaded before

before them; some of whom by prescription grew to be officers in their courts. And by the statute *Westm.* 2. c. 30. it was declared that all justices of the benches from thenceforth should have in their circuits clerks to inroll all pleas, by which this right was confirmed. And the justices of assize have ever since appointed the clerk of assize.

§ 9. It has also been an ancient practice for the sheriffs of counties, to appoint the county clerk and gaoler. The *custos rotulorum* appoints the clerk of the peace. Curstors are appointed by the lord chancellor; and exigenters and philazers by the chief justice of the common pleas,

4 Rep. 34.
Jenk. 216.
4 Mod. 167.

§ 10. There are several ancient offices incident to bishopricks, such as chancellor, commissary, register, &c. which are judicial; and other offices such as steward, surveyor, park keeper, &c. which are only ministerial. And where a new bishopric has been created, the bishop has appointed officers of a similar nature.

§ 11. Offices held immediately from the crown, How granted, must be granted by letters patent. And each office must be granted with all its ancient rights and privileges, and every thing incident to it. For if any office incident to that which is granted, is reserved, the reservation is void. And therefore a grant of the office of marshall of the king's bench prison, to which the office of chamberlain is inseparably incident, with a reservation of the office of chamberlain, was held to be void.

2 Salk. 439.
2 Ld. Raym.
1038.

§ 12. Where an office is incident to another office, such incidental office cannot be granted by the crown; even though the principal office is vacant at the time.

Mitton's
Case,
4 Rep. 32 b.

§ 13. Queen *Elizabeth* by letters patent granted the office of clerk of the county court of *Somersetshire* to one *Mitton* with all fees, &c. and afterwards the queen constituted *Arthur Hopton*, esq. sheriff of the same county, who interrupted *Mitton* claiming that, which was mentioned to be granted by *Mitton* to be incident to his office of sheriff; and thereupon he appointed a clerk himself of the county court. *Mitton* complained to the lords of the council who referred the consideration of the validity of the grant of the said office to the two chief justices, *Wray* and *Anderson*, who held a conference with the other justices and it was resolved by all the justices, *nullo contradicente, aut reluctante*, that the said letters patent were void in law; because the office of sheriff was an ancient office of great trust, and authority; and that the king could not abridge the sheriff of any thing incident or appurtenant to his office, for the office was entire, and so ought to continue. That the county court, and the entering all proceedings in it, were incident to the office of sheriff, and therefore could not by letters patent be divided from it. And although the grant was made to *Mitton*, when the office was vacant, yet it was void. And when the queen appointed a sheriff he should avoid it. And so it was adjudged in *Scroggs* case, in the beginning of the reign of queen *Elizabeth*, were queen *Mary tempore vacationis*, of the office of chief justice of the common pleas, granted the office
of

of exigenter of *London* to *Scroggs*, and it was held void; because it was incident to the office of chief justice of the common pleas; and the next chief justice might avoid it.

§ 14. As to grants of incidental offices by persons holding superior offices, they must in general be by deed duly executed; though Lord *Coke* says that a man may be retained as a steward to keep a court baron, or a court leet, without deed; and it was held by the court of king's bench in a modern case, that an appointment of a clerk of the peace of a county by the *custos rotulorum*, by parol, was good; because it enured as an execution of a power. For whatever is to take effect out of a power or authority, or by way of appointment, is good without deed; otherwise where it takes effect out of an interest.

1 Inst. 61 b.

Saunders v.
Owen,
2 Salk. 467.
1 Ld. Ray.
158.
12 Mod. 199.

§ 15. Lord *Coke* says that if a house or land belong to an office, by the grant of the office by deed, the house or land passeth, as belonging thereunto.

1 Inst. 49 a.

§ 16. The restraints imposed upon bishops, and other ecclesiastical persons, respecting alienation, have not been held to extend to grants of offices: so that their rights in this respect still remain as they were at common law; from which it follows that bishops may grant judicial offices for the lives of the grantees, which will bind their successors: Provided such grants are made and confirmed in the manner required before the disabling statutes were passed.

Bishops, &c.
may grant
Offices.

1 Inst. 44 a.

10 Rep. 61 a.

§ 17. It was resolved in the bishop of *Salisbury's* case that if an office is ancient and necessary, the grant thereof with the ancient fee is not any diminution of the revenue, nor impoverishing of the successor; and therefore for necessity such grants were by construction excepted out of the general restraint of the statute 1 *Eliz.*: and if bishops should not have power to grant offices of service or necessity for the life of the grantees, but that their estate should depend upon uncertainties, as upon the death, translation, &c. of the bishop, then the most able persons would not serve them in such offices, or at least would not discharge their office with any alacrity.

Id. 62 a.
Ridley v.
Pownall,
 2 *Lev.* 136.

§ 18. It was also resolved that in the case of a modern bishopric, a grant of offices of necessity, with a reasonable fee (the reasonableness of which should be decided by the court of justice in which it should depend) should be good.

§ 19. With respect to grants of honorary or ministerial offices by bishops, it has been resolved in a modern case, that offices which existed before the statute 1 *Eliz.* are not within the restraints of that statute; but that they may be granted as before. And that the utility or necessity of the office is not more material since, than it was before the statute.

Trelawney v.
Ep. Winton,
 1 *Burr.* 219.

§ 20. Sir *John Trelawney* brought an action of debt against the bishop of *Winchester* for five years salary of several offices, viz. great and chief steward of the bishopric, and of all its castles, lordships, manors, &c. and conductor of the men and tenants of the bishop,

bishop, with a salary of £100 *per annum*; and master keeper or preserver of the wild beasts in all the forests parks chases and warrens belonging to the bishop; and chief governor of all birds fish and beasts of warren, &c. (commonly called chief parker) with a salary of £20 *per annum*. Which offices and salaries were granted to the plaintiff by the late bishop of *Winchester*, by letters patent, with clause of distress if unpaid. The bishop pleaded the statute 1 *Eliz.* c. 19. which restrains all bishops, &c. from making any gifts or grants of any honors castles manors lands tenements or other hereditaments for any greater estate than twenty-one years or three lives. And also that the offices aforesaid were not ancient offices of the bishopric, nor were usually granted for life; and that the said fees were not the ancient fees; and that the said offices were useless, and merely nominal, and no duty or service to be done for or in respect of them. The jury found a special verdict that the offices of chief steward and conductor of the men, &c. were ancient offices of the bishop, and had been anciently and usually granted for life, with an annuity, and that the annuity of £100 was the ancient fee. That the same were granted to the plaintiff by *Jonathan* late bishop of *Winchester*, which grant was approved by the dean and chapter, and confirmed by them. They then found the statute 1 *Eliz.* and that these offices, at the time of making this act, and since were merely nominal, and no duty attendance or service to be done for or in respect of them. And as to the office of master keeper of all the beasts in the parks, or chief parker, they found that it was not an ancient office.

The

The question on this special verdict was whether Sir *John Trelawney* was entitled to hold the two first mentioned offices, and to recover the arrears against the bishop. As to the office of chief parker the facts found by the special verdict made an end of any question concerning it, and the point was given up.

Lord *Mansfield* said that at common law a bishop, with the confirmation of his dean and chapter, might exercise every act of absolute ownership over the revenues of his see; and bind his successors, as much as tenant in fee could bind his heir. Then came the restraining statute 1 *Eliz.* But patents or grants of offices with fees, salaries or profits annexed to them, were not mentioned in the act. There were no general words adapted to the case of offices; and yet there was not a single bishopric at that time without some offices granted. Had the legislature meant to restrain the regranteeing them, as they should drop in, it must have been done by a special provision, with an exception of some, at least of judicial offices. As the general restraint is not extended to the case, there was no occasion to make exceptions. Continuing ancient offices, with the ancient fee, in the usual manner was not a dilapidation of the revenue of the bishopric. Every bishop left this power to be exercised by his successor, as his predecessor left it to be exercised by him. Such grants being no new charge upon the bishopric, which only remains liable to the same fees or salaries, to which it was liable before.

His lordship after stating several cases concluded in these words—"The office in question in this cause is
" found

“ found never to have been more useful or necessary
 “ than it is now, and yet all the bishops of *Winchester*
 “ from the first *Elizabeth* have thought the grants of
 “ it valid; and every succeeding bishop has submitted
 “ to the grant made by his predecessor, and the
 “ greatest men of the kingdom, or the nearest rela-
 “ tions of the bishop, have successively held the office.
 “ The present bishop thought this grant good for
 “ eleven years, but has conceived a doubt from the
 “ misapplication and repetition of inconclusive and
 “ contradictory arguments about the office being ne-
 “ cessary. Whereas we are all unanimously of opi-
 “ nion that an office and fee which existed before the
 “ 1 *Eliz.* is not within the statute; but may be granted
 “ since, precisely in the same manner in which it was
 “ granted before, and that the utility or necessity of
 “ such an office is no more material since the 1 *Eliz.*
 “ than it was before: and this opinion we think
 “ agreeable to the words and intent of the act, and
 “ every precedent since the statute. And therefore
 “ there must be judgment for the plaintiff.”

§ 21. With respect to the estate or interest which
 may be had in offices, it appears from ancient
 records that several of the great offices of state were,
 and they still continue to be, hereditary, and may be
 held in fee simple. Thus the office of steward of
England was the inheritance of *Hugh De Gretnesnil*,
 who held the honor of *Hinckley* by that service. The
 office of constable of *England* was held by *Milo Fitz-*
walter in fee simple; and afterwards by *Humphrey De*
Bobun. The office of marshal of *England* was held

What Estate
may be had
in Offices.

Cafe of the
Great Cham-
berlain,
2 Bro. Parl.
Ca. 146.

Dyer 285 b.

by

by the earl of *Pembroke* in fee simple. The office of great chamberlain of *England* was held by *Henry De Vere* earl of *Oxford* in fee from whom it descended to the dukes of *Ancafter*; and upon the death of *Robert* duke of *Ancafter*, in 1779, the office descended to his two sisters and coheirs lady *Willoughby De Eresby* and lady *Georgina Charlotte Bertie*.

2 Bro. Parl.
Ca. 167.

Tit. 26.

§ 22. Although the offices mentioned in the last section are usually called offices in fee, yet they are not intitled to that appellation: for they are only inheritable by the lineal descendants of the first grantee of the office, and are exactly similar to what is inaccurately called a dignity in fee.

9 Rep. 97 b.
2 Infl. 382.

9 Rep. 48 b.

§ 23. The offices of sheriff, gaoler, park keeper or forester, steward or bailiff of a manor have also been granted in fee simple. And it is held that where an office may be granted in fee, it may be granted for life or years, or to one for life, remainder to another for life.

§ 24. With respect to judicial offices they cannot in general be granted for a greater estate than for life, because they are only exercisable by persons of skill and capacity.

1 Infl. 42 a.
1 Roll. Ab.
844

§ 25. If an office be granted to a man *quamdiu se bene gesserit*, the grantee has an estate for life. For since nothing but misconduct can determine his interest, no one can prefix a shorter time than his life, since it must be by his own act, which the law will not presume, that his estate can determine. And if

the words be *quamdiu se bene gesserit, tantum*.
estate will not be abridged by the addition of the word
tantum.

Harcourt v.
Fox,
1 Show. R.
426. 506.

§ 26. The judges of the several courts at *Westminster* formerly held their offices, *durante bene placito*. By the stat. 13 W. 3. c. 2. it was enacted that their commissions should be *quamdiu se bene gesserint*, but that it might be lawful to remove them on an address of both houses of parliament. And now by the statute 1 Geo 3. c. 23. the judges are continued in their offices during their good behaviour; notwithstanding any demise of the crown.

§ 27. Offices which do not concern the administration of justice, and only require common skill and diligence, may be granted for years; because they may be executed by deputy, without any inconvenience to the public.

§ 28. The office of register of policies of insurance in *London*, was granted by the king for years; and adjudged to be a good grant; because it did not concern the administration of justice, but only required the skill of writing after a copy.

Veale v.
Priour,
Hard. 351.

Jones v. Clerk,
Hard. 46.

§ 29. But no office of trust, requiring skill and capacity in the execution of it can be granted for years.

§ 30. King *James* 1. granted the office of marshall of the marshallsea for 31 years, and it was held by the chancellor, and four judges that the grant was void,
because

Reynell's
Case,
9 Rep. 95.

because this was an office of great trust annexed to the person, and concerned the administration of justice : and this trust was individual and personal, and should not be extended to his executors or administrators ; for the law will not repose confidence in matters concerning the administration of justice, in persons unknown.

Sutton's Case,
6 Mod. 57.

§ 31. It was determined in a modern case that the office of marshall of the king's bench might be granted to a person for years, determinable on the death of such person. For in that case the office could not go to executors or administrators.

2 Show. R.
171.

§ 32. Lord *Hale* is said to have been of opinion that an office of trust might be granted for years. And that the true reason of the determination in *Reynell's* case was, that the custom had been to grant it in fee. And Lord Chancellor *Finch* is reported to have said that an office may be granted for years : For the same inconveniencies attend an office in fee ; and a person unknown and unfit, as an infant or feme covert may happen to have the same under an estate of inheritance.

9 Rep. 97 a.

176 a.

§ 33. Offices may also be granted at will, and in *Reynell's* case the judges said that the office of marshall of the marshalsea had always been granted for life, or at will. And there is a precedent in *Dyer* of a grant by the king of the office of chirographer of the common pleas, to have as long as it should please his majesty.

§ 34. If the king grants an office to hold at will, and grants a rent to the officer for life, for the exercise of the office; this is not an absolute estate for life; because the rent being granted on account of the office and for discharging the duties of it, whenever the grantee's interest in the office ceases, the rent is determined.

§ 35. There are several offices which may be granted in reversion, where there is an usage to support such a grant, even though they are judicial offices. But without such an usage or custom, no judicial office can be granted in reversion.

Of Reversion-
ary Grants.
2 Vent. 188.
Hard. 357.

§ 36. King *James 1.* granted the office of auditor of the court of wards to two persons, to hold immediately from the death of the two persons who then held the office. It was resolved that this grant was void, because it was a judicial office, and as none can give any judgment of things which may happen *in futuro*, so none can be a judge *in futuro*. And the rule was, that *officia judiciale non concedantur antequam vacent*. For he who at the time of the grant in reversion may be able and sufficient to supply the office of judicature; before the office falls, may become unable and insufficient to perform it.

Curle's Case,
11 Rep. 2.

§ 37. An ecclesiastical office of the judicial kind may be granted in reversion, where there is a custom and usage to support such a grant.

§ 38. The office of register of the bishop of *Ro-*
chester was granted to a person, to hold from the death

Young v.
Stoel,
Cro. Car.

2 Roll. Ab.
153.

or surrender of the person, who then held it for life, to be exercised by the grantee, or his sufficient deputy. It was resolved that the grant was good, for although there is no reversion of an office, unless it be an office of inheritance, yet it may well be granted in reversion, *habendum* after the death of the present officer; it being no more than a provision of a person to supply it, when it becomes void. And where such provision has been usually made, the custom and usage give sanction to it.

Jones v.
Pugh,
2 Salk. 465.

Rex v. Kemp,
2 Salk. 465.
Skim. R. 446.

§ 39. Where the king granted an office to a person *durante bene placito*, and afterwards granted the same office to another person for life, to commence after the death, surrender, or forfeiture, of the first grantee; it was objected that the second grant was void, for the first estate being at will could not be surrendered or forfeited; and that an estate of freehold could not depend upon an estate at will.

The court said, 1st, That an estate at will in lands could not be surrendered, because it was determinable at the will of either party. But an office was not properly at the will of both parties, but at the will of the king only; for the grantee could not determine his will but by surrender. 2d, It might be said to be forfeitable in some measure, and the king's tenants at will might be said to forfeit; for in the case of forfeiture the king would be informed by inquisition before he determined his will, and then upon the return of the inquisition the office would be forfeited. 3d, A freehold estate in lands could not be granted to com-
mence,

mence, *in futuro*, or depend on an estate at will : but a new office might be created to commence *in futuro*, for it was the creature of him who made it ; and it was no otherwise in being than it was in grant ; and the king did not grant a reversion, but *in reversion*, and that not in respect of a particular estate ; but because he was pleased to grant *in futuro*.

§ 40. All those offices which are of a real nature and grantable in fee simple, may be intailed within the statute *de donis conditionalibus*. Because they are demandable in a *præcipe ut tenementa*. Thus Lord Coke says, that the office of the marshal of *England* was intailed ; as also the office of one of the chamberlains of the exchequer.

What Offices may be intailed.

1 Inst. 20 a.

Vide Collins's Claims, 183.

§ 41. The offices of steward, receiver, or bailiff of a manor, or of forester, may be intailed within the statute *De Donis* ; because they are exercisable within lands.

1 Inst. 20 a.
7 Rep. 33 b.
1 Roll. Ab. 838.

§ 42. But offices merely personal are not capable of being intailed. This point was very fully argued in the case respecting the office of Great Chamberlain of *England*, determined by the House of Lords in 1626.

John De Vere, Earl of *Oxford*, in 4 *Eliz.*, being seised in fee-simple of the office of Great Chamberlain of *England*, by his deed, covenanted with the Duke of *Norfolk* and others, that he and his heirs and assigns would from thenceforth stand seised thereof, to the use

Collins's Claims, 281.

of himself for life, remainder to the Lord *Bulbeck* his son and the heirs males of his body. *Robert* Earl of *Oxford* claimed the office under this intail, as heir male of the body of *John* the settlor, and Lord *Willoughby* claimed the same as heir general.

Lord Chief Justice *Crew* delivered his opinion, that the office was intailable within the statute *De Donis*. But a majority of the other judges, amongst whom was Mr. Justice *Dodridge*, (a part of whose argument may be seen in *Collins*), gave their opinion, that this high office was inherent in the blood of the first grantee, and incapable of alienation; and, therefore, could not be intailed by any person seized of it. In consequence of this opinion, the House of Lords certified in favour of Lord *Willoughby* the heir general; and the office was accordingly granted to him by his majesty.

What Offices
are subject to
Dower and
Curtesy,
1 Inst. 32 a.

§ 43. A woman may be endowed of an office of inheritance, as of the office of marshall of the marshall-see, to have the third part of the profits; but, in such case, she must contribute a third part of the charges.

So she may be endowed of a third part of the profits arising from the keeping of the gaol of the abbey of *Westminster*; or of the third part of the profits of courts, fines, heriots, &c.

Plowd. 379.
1 Inst. 29 a.

§ 44. Curtesy is also incident to offices of inheritance; and Lord *Coke* has cited a record, from which it appears that *John* Duke of *Lancaster* was allowed to exercise

exercise the office of *feneschal* of *England*, at the coronation of *Richard 2.*, as tenant by the curtesy.

§ 45. At the same coronation, *John Dymock* claimed the office of king's champion, as tenant by the curtesy, and was admitted and received accordingly. Collins, 5.

§ 46. Ministerial offices requiring only common skill and diligence, may be held by two persons: and so may also some judicial offices established by act of Parliament. But an antient judicial office cannot be granted to two persons. And Lord *Coke* says, that *Henry 6.* having granted the office of high admiral to the Duke of *Exeter* and his son, the judges held it to be void, the charter being of a judicial office; for such antient offices must be granted as they formerly have been. Some Offices may be held by Two Persons.
4 Inst. 146.

§ 47. A grant to two persons to be chief justices of any of the benches is void. But as to offices incident to the king's courts at *Westminster*, it seems to be in the discretion of the judges, if they see that an office in their courts comprehends too much for one man to execute, to join another person with him. But, in such a case, it must still be granted as one office. For if it is divided into two or three different offices, the prescription is interrupted, and it is not a grant of the antient office. 11 Rep. 36.

§ 48. Ecclesiastical offices, though of the judicial kind, may be granted to two persons, where there has been a usage of granting them in that manner.

Jones v.
Bew, Carth.
R. 213.
4 Mod. 16.
1 Show. R.
289.
2 Salk. R.
465.

§ 49. The bishop of *Landaff* granted the office of chancellor or commissary of his diocese to two persons to hold the same *conjunctim et divisim*, to them and the survivor of them. It was agreed by the counsel on both sides, that this office had been antiently and usually granted in this manner. And on a case stated out of Chancery, and referred to the Court of King's Bench, the only question was, whether this was such a judicial office as could be granted to two persons. It was resolved that it was a good grant; and the principal reason of the judgment was, because of the long and constant usage. And it was said, that the offices of most of the bishopricks in *England* were and had been constantly so granted.

2 Salk. R.
465.
Nevill's Case,
Plowd. 378.

§ 50. *Salkeld* reports, that in this case, the court said, if an office be granted to two, and one dies, the office does not survive, but determines. As, if there are two sheriffs, and one of them dies, the other cannot act: otherwise, if granted to two, and the survivor of them.

What Offices
may be af-
signed.
Plowd. 378.
9 Rep. 48 b.
Jenk. 141.
Hob. 170.

§ 51. Where an office is granted to a person and his heirs, or to a person and his assigns for his life, it may in some cases be assigned. For *Jenkins* states that it was held by all the judges in the exchequer, that when the office of chamberlain of the exchequer was granted to *A.* and his assigns, *A.* might assign it, but could not make a deputy, without special words to enable him.

§ 52. There is, however, great obscurity in the books respecting the assignment of offices. In a case reported by *Hardrefts*, the question was, whether the office of teller of the exchequer, which had been granted to a man, *habendum* to him and his assigns, during his life, could be assigned. Serjeant *Glynn* contended, that the office was assignable by reason of the word assigns in the patent; but else it would not have been assignable, being an office of trust which concerns the king in his revenue. That some offices were in their nature assignable without the word assigns, and some not; as a parkership is an office assignable in its nature, being an office of profit. Others are not, *viz.* offices of public trust, as the office in question; so offices granted to men, and their assigns, were assignable, and there was no inconvenience in such a case, for, if assigned to an unfit person, the court would refuse to admit him.

Dennis v.
Loving,
Hard. 424.

Sir *Hencage Finch* argued on the other side, 1st, That the office was not assignable without the word assigns, because it was an office of a great and public trust. 2d, That the *habendum* did not alter the case, it being in the king's case. For it would be inconvenient that the king should have an officer, in such a place, put upon him against his will; and *habendum* to the grantee and his assigns, was no other than if it had been to him and his heirs, which would have been void. In *Hatton's* case, the office of a garbler granted, with power to one to make a deputy, did not extend to an assignee: because it was an office of trust. There was no precedent of an assignment of such an

office. No judgment was given in this case, the king having stopped the proceedings by a writ *de rege in consilio*.

Ante, l. 42.
Collins, 192.
Vide Rex v.
Lenthal,
3 Mod. 143.

§ 53. In the case respecting the office of Great Chamberlain of *England* in 1626, Mr. Justice *Dodridge* was of opinion, that an office was not within the statute of uses.

Who may
hold Offices.
1 Inst. 3 b.
Jenk. 121.

§ 54. Lord *Coke* says, that, “ if an office, either in the grant of the king, or of a subject which concerns the administration, proceeding, or execution of justice, or the king’s revenue, or the common wealth, or the interest, benefit, or safety of the subject, or the like, be granted to a man that is inexperienced, and hath no skill and science to exercise or execute the same, the grant is merely void, and the party disabled by law, and incapable to take the same, *pro commodo regis et populi*. For only men of skill, knowledge, and ability to exercise the same, are capable of the same, to serve the king and his people.”

Vintner’s
Case,
Bro. Ab. Tit.
Office, 48.
Dyer, 150.

§ 55. King *Edw. 4.* by letters patent, appointed *Thomas Vintner* to be clerk of the crown. The judges of the Court of King’s Bench, with the assent of the judges of the Court of Common Pleas, refused him ; because he was not exercised in his office, nor any other in the court, as he ought by a long time, and so declared to the king. Upon which the king, by advice of the justices, appointed one *John West* clerk there, who was expert, and sent to the said justices his letters

letters under his signet, which after were inrolled in the same court, that they rejected *Vintner* and admitted *West*.

§ 56. A clergyman was made chancellor to a bishop, and confirmed by the dean and chapter : but, because he was not learned in the canon and civil law, he was removed by the ecclesiastical commissioners. And though it was insisted that he had a freehold, and therefore had prayed a prohibition, yet it was denied,

Sutton's Case,
Cro. Car. 65.
Walker v.
Lamb,
Cro. Car. 258.

§ 57. A grant of an office of skill to an infant, to be exercised *in præfenti*, is void. But if *in futuro*, and that he is of full age and expert, when the office is to be exercised, the grant is good.

Jenk. 121.

§ 58. Where in the grant of an office it is expressly said, that it shall be exercisable by deputy, the grantee need not have such skill and knowledge, as is necessary to the execution of the office.

Young v.
Stoel,
Cro. Car. 279.

§ 59. Offices merely ministerial, which do not require particular skill or knowledge, may be granted to any person, and even to women.

Thus, a woman may have the office of the custody of a castle; and Lord *Coke* mentions an instance of a woman's having the office of forester in fee-simple. But he observes, that she could not execute the office herself, but was obliged to appoint a deputy during the eyre, who should be sworn,

Lady Russell's
Case,
Cro. Jas. 17.
4 Inst. 311.

Collins, 119.

§ 60. Mr. Serjeant *Dodridge*, in his argument respecting the barony of *Bergavenny*, mentions, that the office of high constable of *England* descended to the daughter of *Humphrey De Bohun* Earl of *Hereford* and *Essex*. The office of lord steward descended to *Blanch* daughter of *Henry* Earl of *Lancaster*, in whose right *John* of *Gaunt* enjoyed the same. And the office of Earl *Marshall* descended by an heir female to the house of *Norfolk*.

The office of Great Chamberlain of *England* is at this moment held by the two sisters and co-heirs of *Robert* late Duke of *Lancaster*.

How to be
exercised.

§ 61. Offices which concern the administration of justice, such as the judges of the king's courts at *Westminster*, &c. must be exercised in person, and not by deputy.

§ 62. There is, however, one exception to this rule; for a sheriff, though his office concerns the administration of justice, may notwithstanding appoint a deputy, by the name of under-sheriff.

4 Inst. 291.

§ 63. There are some offices of the judicial kind, in the creation or grant of which is contained a power of appointing a deputy. Thus, the chief justices in eyre may appoint deputies, by the express words of their patents, to exercise the office for them.

§ 64. A ministerial office which is to be performed by the grantee in person, cannot be exercised by deputy.

puty. Thus, it is said in *Dyer*, that the office of carver, being an office of trust, cannot be exercised by deputy. 7 b. pl. 10.

§ 65. But ministerial offices which are not of trust, and do not require any particular skill, may in general be exercised by deputy. And all offices which may be assigned, may be exercised by deputy. For, *cui licet quod majus est, non debet quod minus est non licere*. Earl of Shrewsbury's Case, 9 Rep. 46.

§ 66. Lord Coke says, there is a great difference between a deputy and an assignee of an office. For an assignee is a person who has an estate or interest in the office itself, and doth all in his own name, for whom his grantor shall not answer, unless it be in special cases. But a deputy has no estate or interest in the office, but is the officer's shadow, and doth all things in the name of the officer, and nothing in his own name, and for whom his grantor shall answer. 9 Rep. 48 b.

§ 67. A deputy cannot, in general, make a deputy; for a deputy being only one who is authorized himself, he cannot delegate his authority to another. But it has been held that a steward of a manor, who is authorized to exercise the office by himself, or his sufficient deputy, may enable another person to take a surrender out of court. Parker v. Kett, 1 Ld. Ray. 658.

§ 68. Offices of inheritance may be exercised by deputy in case the persons entitled for the time to the office are incapable of exercising it in person: as, where such offices descend to infants or women, or to a per-

Collins, 69. son under the rank of a knight. Thus, the office of
Keilw. 171 a. Earl Marshall of *England*, and also that of High Constable of *England*, may be exercised by deputy.

Duke of
Buckingham's Case,
Dyer, 285 b.
1 Inst. 165 a.
Vide 2 Bro.
Parl. Ca. 158.

§ 69. *Humphrey De Bobun* Earl of *Hereford*, held the manors of *Harlefield*, &c, of the king by the service of being constable of *England*, and had issue two daughters. Upon a question how the daughters, before marriage, could exercise the office, it was resolved, that they might make their sufficient deputy to do it for them; and, after marriage, the husband of the eldest might do it alone,

2 Bro. Parl.
Ca. 146.

§ 70. In the case respecting the office of Great Chamberlain of *England*, which was heard in the House of Lords in the year 1782, *Lady Willoughby of Eresby*, (the wife of Mr. *Burrell*), who was the eldest of the two sisters, and coheirs of *Robert Duke of Ancaster*, claimed this office; and contended, that, if there was any ground to say that the office had descended to both the sisters, still that the right to exercise the office belonged to Mr. *Burrell* as the husband of the eldest. And, in support of this claim, it was insisted, that the office of Great Chamberlain of *England* was an hereditary office in gross held in grand serjeanty; and, in the case of coheirs, when the eldest happened to be a feme covert, descended upon the eldest, and was to be executed by her husband: and that this was perfectly agreeable to, and warranted by, the usage in all such great offices as had in the course of time descended to heirs general. The office of steward of *England* had descended in two instances to the

the eldest daughter. The office of constable of *England* had come to *Humphrey de Bohun* by his marriage with the eldest daughter of *Milo Fitzwalter*. The office of Earl *Marshall* of *England* came to *Roger Bigot* Earl of *Norfolk*, in right of his mother *Maud*, who was the eldest daughter of *William Marshall* Earl of *Pembroke*.

The following question was put to the judges :—

“ The late Duke of *Ancafter* having died seised of
 “ the office of Great Chamberlain of *England*, leaving
 “ Lady *Willoughby* of *Eresby*, and Lady *Charlotte*
 “ *Bertie*, his sisters and coheiresses ; does the said
 “ office belong to the eldest alone, or to both ; or,
 “ in either case, is the husband of the eldest en-
 “ titled to execute the said office, or may both sisters
 “ execute it by deputy ; and how must such deputy
 “ be appointed ? Or does it devolve upon the king
 “ to name a proper person to execute the office dur-
 “ ing the incapacity of the heir ? The judges deli-
 “ vered their unanimous opinion, “ that the office
 “ belonged to both sisters ; that the husband of the
 “ eldest was not, of right, entitled to execute the said
 “ office. That both sisters might execute it by de-
 “ puty to be appointed by them ; such deputy not
 “ being of a degree inferior to a knight ; and to be
 “ approved of by his majesty.”

The Lords certified accordingly.

Qualifica-
tions required
for holding
Offices.

§ 71. With respect to the oaths required to be taken, and the ceremonies to be performed, as qualifications for holding offices, it is enacted by the 18 *Cha. 2. ft. 2. § 1.* that no person shall be chosen to any office of magistracy, place of trust, or other employment relating to the government of any city, corporation, borough, cinque port, or other port town, who shall not have received the sacrament, according to the rites of the church of *England*, within one year next before such election. And that every person so placed or elected, shall take the oaths of allegiance and supremacy.

§ 72. By the statute 25 *Cha. 2.*, commonly called the *Test Act*, it is enacted, that all officers, civil and military, (except those of inheritance appointing deputies), and all who have any place of trust or employment in the king's household, shall take the oaths of allegiance and supremacy and test, the next term in the King's Bench or Chancery, or Quarter Sessions, and receive the sacrament within three months, and give in a certificate thereof, proved by two witnesses, to the court wherein they take the said oaths; and in case of neglect, shall be disabled to hold the said offices, &c. and forfeit 500 *l.*

§ 73. An act is passed regularly every year to indemnify persons in office who have neglected to qualify themselves according to what is provided in the test act.

§ 74. Though

§ 74. Though the words of the statute 13 *Cha. 2.* are so very strong as to make elections to offices void, and those of the test act, to make such persons disabled in law to all intents and purposes whatsoever to hold such offices, yet it has been held, that the acts of persons not qualified according to these statutes may be valid as to strangers. For otherwise, not only those who no way infringe the law, but even those whose benefit is intended to be advanced by it, might be sufferers for another's fault, to which they were in no wise privy.

§ 75. The intention of the statute 13 *Cha. 2.* was to exclude persons who were not of the church of *England* from all offices which concern the government, and is to be considered as prohibitory upon the electors *quoad* such persons. A dissenter, therefore, being ineligible to such office, cannot be fined for refusing to accept it.

§ 76. The corporation of *London*, by a bye-law, imposed a fine of 600 *l.* upon every person who, being elected, should refuse to serve the office of sheriff. The chamberlain of *London* levied debt on a person named *Evans* for the penalty of his refusal to serve the office of sheriff, who pleaded the statute 13 *Cha. 2.*, averring that he was a protestant dissenter within the toleration act, of scrupulous conscience, and therefore had not received the sacrament. The plaintiff replied the 5 *Geo. 1.* which confirms members of corporations in their respective offices, although they have not received the sacrament. To this, the defendant demurred,

Harrison v.
Evans, 3 Bro.
Parl. Ca. 465.

red, and judgment was given in favour of the city; but reversed by a special commission, and the reversal affirmed by the House of Lords.

Of the Offence
of buying
Offices,
1 Inst. 234 a.

§ 77. By the statute 5 and 6 *Edw. 6.*, it is enacted, that persons who shall sell any office, shall lose and forfeit all their right, interest, and estate in such offices, and in the gift and nomination thereof; and that all persons who shall purchase such offices, shall be disabled from occupying or enjoying such offices; and that all such bargains shall be void: provided that the act shall not extend to any offices whereof any person shall be seised of any estate of inheritance, nor to any office of parkerhip, or of the keeping of any park, house, manor, garden, chase or forest. Provided that all acts of persons offending against this statute, done before they are removed from their offices, shall be good and valid.

Provided that this act shall not extend to any of the chief Justices of the Courts of King's Bench or Common Pleas, or to any of the justices of assize.

3 Inst. 148.
Cro. Ja. 269.

§ 78. Lord *Coke* says, that the statute 5 *Edw. 6.* extends as well to ecclesiastical, as temporal offices, which concern the administration and execution of justice; and that it was resolved in the case of *Dr. Trevor*, chancellor of a bishop in *Wales*, that both the office of chancellor and register of a bishop, were within that statute; because they concern the administration of justice. And *Croke*, in his report of this case, says, it was held, that although these offices concern matters principally

principally *pro salute animarum*; yet they also concern matters about matrimony, and legitimation, which touch the inheritance of the subjects; and about matters of legacy, for chattels real and personal; and, in that respect, are courts of justice.

§ 79. The office of archdeacon's register is within the statute: and though the persons to whom the sale and grant was made die, yet the archdeacon is disabled by the statute from making any other grant thereof, and the king shall have the nomination.

Woodward
v. Fox,
3 Lev. 289.
2 Vent. 187.
Willes R. 571.

§ 80. The office of cofferer of the king's household is within the statute, and if a person purchases this office, he becomes thereby disabled from enjoying it.

§ 81. Sir Robert Vernon knight being cofferer of the king's house sold the same for a certain sum of money to Sir Arthur Ingram, and agreed to surrender it to the king, to the intent that a grant might be made of it to Sir Arthur. The surrender was accordingly made, and Sir Arthur was admitted. It was resolved by Lord Chancellor Egerton, the chief justice, and others to whom the king referred the same, that this sale was void by the statute, and that Sir Arthur was disabled to hold the office, and that the king could not, by a *non obstante*, dispense with this act, so as to enable Sir Arthur to enjoy the office at any time; even by a new grant, upon a subsequent vacancy.

Ingram's
Case, 1 Inst.
234 a.
Cro. Jac. 386.

§ 82. With respect to those offices which are not within the statute § *Edw. 6.* offices of inheritance and

also offices of parkership are expressly excepted by a proviso in the act. And all under-leases of such offices are also excepted inclusively.

Godbolt's
Case,
4 Leon. 33.

§ 83. The office of bailiff of a hundred is not within the statute; for it is not an office of trust, nor does it concern the administration of justice.

§ 84. There are several offices incident to the courts of law at *Westminster*, such as the clerk of the rules of the king's bench, the prothonotary, clerk of the warrants and inrolments in the common pleas, &c. which being in the gift of the chief justices are expressly excepted out of the act.

The offices of the sixty clerks in chancery are not within the statute.

Prec. in Cl.a.
199.
Symonds v.
Gibson,
2 Vern. 308.
5 Burr. R.
2698.
1 H. Black.
326.

§ 85. This statute does not extend to Commissions in the army. And it was formerly held that the office of purser of a ship of war was not within it. But Lord *Mansfield* has said that, if the lords of the admiralty were to take money for their warrant to appoint a person to be a purser, it would be criminal in the corrupter, and corrupted.

Huggins v.
Bambridge,
Willes R.
241.

§ 86. It was held in a modern case that a contract with the warden of the Fleet, (who held only for life under the crown), that for a sum of money he should surrender the office to the king; to the intent that he should procure from the king a grant of the office, to the purchaser, was void, by the statute 5 and 6 *Edw.* 6. c. 16. though that office had been and might be granted

granted to a subject in fee. And that a bond given to secure the payment of such consideration money could not be enforced in a court of law.

§ 87. It was also held in the same case that the exception in the statute 5 and 6 *Edw. 6. c. 16.* that the act should not extend to any office of which any person was seized of an estate of inheritance, meant only offices of which subjects were seized of estates of inheritance.

§ 88. And in another case it was held that a bond given by any of the officers mentioned in the statute 5 and 6 *Edw. 6. c. 15.* for securing all the profits of the office to the person appointing, was void by that statute. So was a bond given by such an officer to surrender whenever the person appointing chose.

Layng v. Paine, Willes R. 571.

§ 89. Where an agreement or bargain is made by a deputy to pay his principal half the profits of an office, it is not within the statute; because it is not to pay him a sum in gross, but half the profits which must be sued for in the principal's name: for they belong to him, though a share is to be allowed out of them to the deputy for his trouble.

What bargains are not within the Statute. Culliford v. De Cardonel, 2 Salk. 466. Godolphin v. Tudor, Id.

§ 90. But an agreement to allow a person a certain proportion of the profits of an office, in consideration of his having procured or been aiding in to the appointment of it, is void.

Parsons v. Thompson, 1 H. Black. 322.

Where Equity
relieves.

§ 91. As the provisions of the statute 5 *Edw. 6.* do not extend to all cases, within the mischief which it was intended to prevent, courts of equity have frequently interposed. For though it be true that penal laws are not to be extended as to penalties and punishments, yet if there be a public mischief, and a court of equity sees private contracts made to elude laws, enacted for the public good, it ought to interpose.

Treat. of Eq.
B. 1. c. 4. § 4.

Morris v.
M'Culloch,
Amb. 432.

§ 92. A person gave a sum of money to another for procuring him a commission in the marines. Lord Chancellor *Henley* decreed the bargain void, and said—
“ I lay down this rule, that if a man sells his interest,
“ to procure a permanent office of trust or service
“ under the government, it is a contract of turpitude :
“ it is acting against the constitution, by which the
“ government ought to be served by fit and able per-
“ sons, recommended by the proper officers of the
“ crown, for their abilities, and with purity.

Hancington
v. Du Chatel,
1 Bro. Rep.
124.

§ 93. Lord *Rochfort* being groom of the stole to his Majesty, and in consequence of that office recommending pages of the presence, treated with the plaintiff's testator to recommend him upon a vacancy on condition that he should grant two annuities to particular persons. An action being brought on the bonds securing these annuities by the defendant's testator, for the arrears of the annuity, the plaintiffs filed their bill for an injunction. The defendants had demurred, and the demurrer had been over-ruled. Upon a motion to continue the injunction, upon the merits, the answer being put in, it was argued upon the part
of

of the plaintiffs that the bonds were, *pro turpi causâ*; that Lord *Rochford*, having a confidence placed in him by the king, had abused that confidence, by selling his recommendation; and that, upon the public policy of the law, such an agreement ought not to stand. On the other hand it was argued, that it was allowed this was not an office within the statute of *Edw. 6.* that it was merely an office respecting the king's private, not his public character; and that if it was *turpis contractus*, that might have been pleaded at law. Lord *Thurlow* expressed his doubts, whether it might not have been brought upon the record at law by a plea, and made a defence there to the action; but thought that not a sufficient reason to prevent his interposition, the court of law never having determined that it could be so brought there as a defence. He then, admitting that it was not within the statute *Edw. 6.* but treating it as a matter of public policy of the law, and similar to marriage brocage bonds, where, though the parties are private persons, the practice is publicly detrimental, ordered the injunction to be continued till the hearing; and afterwards upon the hearing ordered it to be perpetual,

Hartwell v. Hartwell,
4 Vef. Jun.
811.

§ 94. Offices may be lost. 1. By forfeiture. 2. By acceptance of another office incompatible with that which the person holds. 3. By the determination of the thing to which the office was annexed.

How Offices
may be lost.

§ 95. It is a general rule that if a person does any act which is contrary to the nature and duty of his office, or refuses to perform the services annexed to it,

Forfeiture.

Lit. f. 378.

the office is forfeited. For in the grant of every office there is a condition implied, that the grantee shall execute it faithfully and diligently.

9 Rep. 50 a.

§ 96. Lord *Coke* says, “ there are three causes of
 “ forfeiture or seifure of offices, for matter of fact;
 “ as, for abusing, not using, or refusing. Abusing or
 “ misusing; as if the marshall or other gaoler suffer
 “ voluntary escapes, it is a forfeiture of their offices.
 “ So if a forester or park keeper fell and cut down
 “ wood, unless for necessary brush, it is a forfeiture
 “ of their offices; for destruction of vert, is de-
 “ struction of venison. As to non-user there is a dis-
 “ ference, when the office concerns the administration
 “ of justice, or the commonwealth, and the officer
 “ *ex officio*, or of necessity, ought to attend without
 “ any demand or request; there the non-user or non-
 “ attendance in court is a forfeiture. As the office of
 “ chamberlain in the exchequer, prothonotary, &c.
 “ in the common pleas, &c. for the attendance of
 “ these and the like officers is of necessity for the ad-
 “ ministration of justice. So the attendance of the
 “ clerk of the market is of necessity for the common-
 “ wealth. So of holding the sheriffs tourn. But
 “ when the officer ought not to attend or exercise his
 “ office but on demand or request to be made by him
 “ to whom he is officer, there non-user or non-
 “ attendance is no cause of forfeiture without demand
 “ or request made. But when the office concerns any
 “ man’s private property, and the officer ought *ex officio*
 “ to attend his office without request, there the non-
 “ user or non-attendance is no cause of forfeiture,
 “ unless

“ unless the non-user or non-attendance is cause of
 “ prejudice or damage to him, whose officer he is, in
 “ something which concerns his charge. As if a
 “ parker or *custos parci* does not attend one or two
 “ days, and within these days no prejudice or damage
 “ happens, it is no forfeiture. But, if by reason of
 “ his absence persons unknown kill any deer, it is a
 “ forfeiture of his office. As to refusal it is to be
 “ known, that in all cases when an officer is bound
 “ upon request to exercise his office, if he do it not
 “ upon request, it is a forfeiture. As if the steward
 “ of a manor is requested by the lord to hold a court,
 “ which he does not, it is a forfeiture.”

§ 97. A Filazer of the court of common pleas was
 absent from his office during two years, and farmed it
 from year to year without leave of the court, for
 which he was discharged, and no record of the dis-
 charge was entered on the roll. And upon his bring-
 ing an assise this was held a good discharge.

Vaux v.
 Jefferen,
 Dy. 114 b.

§ 98. If a tenant in tail of an office commits a for-
 feiture it shall bind the issue, by force of the condition
tacite annexed by law to such estate. But, if an officer
 for life commits a forfeiture, this shall not affect the
 person intitled to the inheritance.

7 Rep. 34 b.

§ 99. If the deputy of an office in fee does any act
 by which the office is forfeited, the inheritance of the
 office is thereby lost. But if a person having an office
 of inheritance, leases it for life, and the lessee commits
 a forfeiture, this shall not forfeit the inheritance.

Bro. Ab.
 Tit. Deputy,
 Pl. 7.

2 Lev. 71.

3 — 288.

Bro. Ab.
Tit. Office,
Pl. 51.

§ 100. It is held in some cases that where there are two joint officers, the forfeiture of one, is a forfeiture of the other; for both are one and the same officer, and the office is entire.

§ 101. It has however been determined that where an office is granted to two, and one of them is attainted of treason, the other shall not forfeit.

Nevill's Case,
Plowd. 378.

§ 102. Sir *Edward Nevill* and *Henry Nevill* his son were keepers of *Alyngton* park with a certain fee during their lives, and the life of the longest liver of them. Sir *Edward Nevill* was attainted of treason, and the question was, whether the king should have the office by the attainder. It was resolved that, being only an office of skill and confidence, the same was not forfeited to the king; but that the survivor should hold the same, with the profits incident thereto, during his life.

Woodward v.
Fox,
Ante, f. 79.

§ 103. Where an ecclesiastical office is forfeited, the benefit of it goes to the king as supreme ordinary.

Poph. R. 119.
2 Vern. 174.

§ 104. Where a principal officer is authorized to appoint inferior officers under him, if such inferior officers commit a forfeiture, the superior officer shall take advantage thereof.

Acceptance
of an incom-
patible Office.

§ 105. A person may lose an office by the acceptance of another office, incompatible with that which he already holds. And all offices are incompatible and inconsistent where they interfere with each other.

For

For that circumstance creates a presumption, that they cannot be executed with impartiality and honesty.

§ 106. Thus Lord *Coke* says, that a forester by patent for life having been made justice in eyre of the same forest *hac vice*, the forestership became void : for these offices are incompatible, because the forester is under the correction of the justice in eyre, and he cannot correct himself. 4 Inst. 310.

§ 107. Upon a *mandamus* to restore a person to the place of town clerk, it was returned that he was elected mayor and sworn, and therefore they chose another town clerk. And the court was strongly of opinion that the offices were incompatible, because of the subordination. Rex v. Pergam, Sid. R. 305. Milward v. Thatcher, 2 Term R. 81.

§ 108. An office may be lost by the destruction of the thing to which it is incident. As if a person grants the office of parker, and afterwards destroys his park, the office, together with all casual fees annexed to it, is gone. For the office, being only an accessory, must follow the fate of the principal. For although the grantor of the office could not appoint another person as long as the park continued, yet when the park itself was determined and disparked, the office, which was appendant thereto, should also be determined. And it was said that if one grant the office of steward of a manor, with all profits of courts; and the manor is afterwards destroyed, the office of steward, together with the casual profits annexed to it, is determined. Destruction of the Principal. Howard's Case, Cro. Car. 59.

Cro. Car. 61.

§ 109. In the above case an annual fee of £40 had been granted to the parker issuing out of the king's manors in the county of *Surry*. And a question arose whether that was determined by the destruction of the park. Sir *John Walter*, chief baron, held clearly that it was. But all the other justices and barons dissented from him, because the annual fee was granted by a distinct clause, and not out of the park: and although the office was determined, yet because it was not by the act or default of the grantee himself, but by the act of the grantor only, they conceived, the grantee should enjoy the annuity.

TITLE XXVI.

DIGNITIES*.

- | | |
|---|---|
| <p>§ 1. <i>Origin of Dignities.</i>
 15. <i>Names or Titles of Dignities.</i>
 38. <i>Of Dignities by Tenure</i>
 48. <i>Of Dignities by Writ.</i>
 50. <i>The Person summoned must sit.</i>
 52. <i>What Proof necessary.</i>
 54. <i>Descendible to Females.</i>
 68. <i>Of Writs to the eldest Sons of Peers.</i>
 78. <i>Of Dignities by Letters Patent.</i>
 97. <i>Whether a Dignity may be refused.</i>
 98. <i>What Estate may be had in a Dignity.</i>
 106. <i>No Curtesy of a Dignity.</i>
 114. <i>A Dignity cannot be aliened.</i>
 119. <i>Nor surrendered to the King.</i>
 123. <i>A Peer degraded for Poverty.</i>
 125. <i>A Dignity not extinguished by a new Title.</i></p> | <p>§ 128. <i>An Earldom does not attract a Barony.</i>
 132. <i>A Dignity is forfeited by Attainder.</i>
 134. <i>Corruption of Blood.</i>
 137. <i>Exception—Intailed Dignities.</i>
 139. <i>Restitution of Blood.</i>
 143. <i>Descent of Dignities.</i>
 149. <i>Abeysance of Dignities.</i>
 156. <i>The King may terminate the Abeysance.</i>
 163. <i>Effect of a Writ of Summons to one of the Heirs of a Coheir.</i>
 165. <i>Where only one Heir, the Abeysance terminates.</i>
 171. <i>Attainder of one of Two Coheirs does not determine the Abeysance.</i>
 174. <i>Length of Time does not bar a Claim to a Dignity.</i></p> |
|---|---|

Section I.

THE dignities or titles of honour, which now subsist in England, derive their origin from the feudal institutions, and were introduced into this country by the Normans,

Origin of
Dignities,

It

* No title of the *English* law has been so little discussed as that of Dignities, nor has any systematic arrangement of it been ever published. The only work on the subject is *Collins's* Proceedings on Claims concerning Baronies by Writ, which consists of a miscellaneous collection of cases. Little assistance could therefore be derived from the labours of others; but the Author is much indebted to the extensive information and liberality of *Francis Townsend Esq. Windsor Herald.*

It was a fundamental principle of the feudal polity, that the supreme authority should reside in the general assembly of the state; which was originally composed of the king, and of all his immediate tenants, who were bound to attend him on such occasions, as a part of the service by which they held their lands; it being a rule of the feudal law, that every vassal was obliged to be present at his lord's court, and there to assist him with his advice.

Gloss. voce
Placitum.

§ 2. This service is thus described by *Ducange*. *Servitium placiti, service de plaidis, quod vassallus domino suo feudato debet, cum placita sua seu assisas tenet, (quod sequi et juvare dominum de placito vocabant). Hinc formula in hominiis: pro prædictis feudis vobis fidelis existam, et fidele servitium faciam, videlicet guerram et placitum; ad submonitionem vestram, vel cujuslibet nuntii vestri. Vassalli quippe omnes ad ea placita convenire tenebantur.*

§ 3. The power of the feudal sovereigns over their vassals was extremely limited; they had no right to demand any services or duties, which were not expressly reserved to them upon the grant and investiture of the feud: and, therefore, as to all things that were extra-feudal, the particular consent of the vassals was necessary. Hence arose the practice of summoning the vassals, to obtain their consent to any new measure the sovereign might wish to adopt; which gave rise to those general assemblies that, upon the continent, were called *States*, and, in *England*, *Parliaments*.

§ 4. When

§ 4. When *William the Norman* acquired the crown of *England*, he distributed the greater part of the lands, which belonged to the *Saxon* nobility, among his followers, to hold of him as strict feuds, reserving the usual services; among which, attendance upon the king's high court was one of the principal. And, about the 20th year of his reign, the tenure of all the lands in *England* became feudal, and they were subjected to all the feudal services.

Wright's
Ten. 52.

§ 5. This duty of attendance on the king's high court, gave a species of dignity to those, who were bound to it, and procured them an honourable appellation and distinction. The first titles, by which they were called, were those of *Earl* and *Baron*; and the possessions, from which they derived these appellations, acquired the names of *comitatus* and *baronia*. Hence, *Ingulphus* says of the Conqueror, *comitatus et baronias Normannis suis distribuit*.

§ 6. The persons who possessed these dignities were also called *Peers of the Realm*, or *Peers of Parliament*, from the word *pares*; which, in the feudal law, denoted persons holding of the same lord, under the same laws or customs, and with equal powers: for, in that system, the tenants of every lord, who met together in his court to determine the disputes arising within his feignory, were called *Pares Curia*. Thus *Spelman* says, *Pares dicuntur, qui, acceptis ab eodem domino, puta rege, comite et barone (sive majori sive minori) feudis, pari lege vivunt; et dicuntur omnes pares curia, quod in curia domini illius, cujus sunt vassalli, parem habent potestatem, scil: vassalli regis, in curia regni; vassalli comitis,*

Gloss. voce
Pares.

comitis, in curiâ comitatûs; vassalli baronis, in curiâ baronis.

§ 7. The dignities or titles of earl and baron, having been originally annexed to landed estates, were considered as incorporeal hereditaments, wherein a person might have a freehold estate; and, although they are now become little more than personal honours, yet they are still classed under the head of real property.

§ 8. During the reign of *William the first*, and that of his sons, all dignities or titles of honour were annexed to lands; and every person, who held his estate *in capite, ut de personâ regis*, was *ipso facto* a peer of parliament. But, although persons, holding one or two knights fees by this tenure, had a right to attend parliament, yet it is supposed that, from their inability to support the expence of this service, they were soon exempted from it; and none were required to attend but those who possessed a considerable number of knight's fees, or a manor.

§ 9. Whenever the first kings of the *Norman race* determined to hold a general assembly of their principal vassals, (which was afterwards called a *parliament*), they issued a writ of summons to all their immediate tenants, requiring their attendance; but, when these tenants became very numerous, only the principal landholders or *barones majores* were particularly summoned, by the king's writ; and the sheriffs of the different

different counties were directed to summon the inferior
'ones, or *barones minores*.

§ 10. Thus, in king *John's Magna Charta*, c. 14. it is stipulated, that parliaments shall be summoned in this manner : *Et ad habendum commune concilium regni de auxilio assidendo aliter quam in tribus casibus prædictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones, sigillatim per litteras nostras ; et præterea faciemus summoneri in generali, per vice-comites et ballivos nostros, omnes illos qui de nobis tenent in capite, ad certum diem, &c.*

Black.Tracts.
4 Inst. 45.

§ 11. About the end of the reign of *Henry 3.* a considerable alteration took place in the rights of the barons to sit in parliament ; for, whereas every tenant *in capite* was *ipso facto* a parliamentary baron, and entitled to be summoned, either by the king's writ, or by the sheriff, yet, about that period, some new maxim or law was introduced, by which it was declared that no person, though holding lands *per integram baroniam*, should come to parliament without being particularly summoned by the king.

§ 12. This fact appears to have been first mentioned by *Camden* in his *Britannia* ; who cites an antient writer, without naming him, as his authority : *Ille enim, (Hen. 3.) ex satis antiquo scriptore loquor, post magnas perturbationes et enormes vexationes inter ipsum regem, Simonem de Monteforti, et alios barones, motas et susceptas, statuit et ordinavit ; quod omnes illi comites*

et

et barones regni Angliæ, quibus ipse rex dignatus est brevia summonitionis dirigere, venirent ad parlamentum, et non alii; nisi forte dominus rex alia illa brevia iis dirigere voluisset.

Tit. of Hon.
P. 2. c. 5.
f. 21.

§ 13. *Selden* does not give much credit to this relation, and says, he never could discover who this antient writer, cited by *Camden*, was; but thinks that, not long after the great charter of king *John*, or probably in his life-time, some law was made, that induced the utter exclusion of all tenants *in capite* from parliament, except the antient and greater barons, and such others as the king thought proper to summon.

12 Rep. 71.

§ 14. Lord *Coke* has also cited this passage from *Camden*, and says: “Which act or statute continues “in force to this day; so that now none, although “that he hath an entire barony, can have a writ of “summons to parliament without the king’s warrant, “under the privy seal at least.” And it has long been established that the king is the fountain of honour, and has the sole right of conferring dignities.

4 Inst. 363.

Names or
Titles of
Dignities.

§ 15. With respect to the different orders and titles of dignity in *England*, one of the most antient, although the lowest, is that of baron; which was introduced here from *France*; where it denoted a person, who held a *feudum nobile*, with the right of administering justice in criminal and civil cases: for the Author of the *Grand Coustumier de France*, lib. 2. c. 27. says, “*tout homme, qui a haute justice en resort, se*
“ *peut*

“*peut nommer baron.*” And, in *Normandy*, the superior feuds, which were held immediately of the duke, were called “*Fiefs de Hautber* ;” which is supposed, by the best writers, to mean *haut baron*, in order to distinguish them from the inferior barons.

Hervé, tom. i.
p. 139.

§ 16. Upon the establishment of the *Normans* in *England*, every person holding his lands immediately of the king, and having a certain number of free tenants holding of him, was called a baron : his estate was termed a barony, seignory, or manor ; and the court, in which he administered justice to his tenants, was denominated his court-baron, an appellation by which it is still known.

Vide Tit. i.
f. 5.

§ 17. It has been stated, that these barons were all entitled to sit in parliament ; and, therefore, the first dignity or title of nobility which was known in *England*, was that of baron. Hence Lord Coke says, that in antient records, “ the barony included all the nobility of *England* ; because, regularly, all noblemen “ were barons, though they had a higher title.”

2 Inst. 6.
Seld. Id. f. 17.

§ 18. In course of time, the right of sitting in parliament seems to have been confined to those, who held their lands *per baroniam*. But it does not clearly appear, what was the precise nature of this tenure. *Spelman* says, that every tenure *in capite* was a tenure *per baroniam* : *Ævo Henrici secundi, quævis tenura in capite habebatur pro tenura per baroniam*. It is, however, said in a tract, intitled, “ An inquiry into the Manner of creating Peers,” supposed to have

Gloss. voc
Baronia.

P. 18,

been written by *Richard West Esq.* afterwards Lord Chancellor of *Ireland*, that, although every barony was a tenure *in capite*, yet every tenure *in capite* was not a barony; and that, since the term tenant *in capite* was equally applicable to all services, what distinguished a baron from all other tenants *in capite*, must have been the reservation of some particular services, which were implied in the phrase, *tenere per baroniam*.

Gloss. voce
Honor.

2 Inst. 64.

§ 19. A barony was also called an honour, as appears from the following passage in *Spelman*: *Honor ab Anglo-Normannis dictum videtur uniuscujusque majoris baronis feudale patrimonium, seu baronia; uti manerium plurimis gaudet (interdum feodis sed plerunque) tenementis consuetudinibus, servitiis, &c. Ita honor plurima complectitur maneria, plurima feoda militaria, plurima regalia, &c. Dictus etiam hic olim est beneficium, seu feodum regale, totusque semper a rege in capite.*

§ 20. Mr. *Madox*, in his “*Baronia Anglica*,” or history of land honours and baronies, says: “In the ages next after the Conquest, when a great lord was enfeoffed by the king of a large feignory, such feignory was called an honour; as the honour of *Gloucester*, the honour of *Wallingford*, &c. It might also be called a barony.”

1 Inst. 108 a.

§ 21. In the reign of *Henry 8.*, an honour appears to have been considered only as an illustrious manor or lordship, or several manors united, having one capital seat. Thus, certain manors belonging to the crown
were

were then created honours by act of parliament ; such as the manors of *Hampton Court*, *Ampthill*, and *Grafton*. But Mr. *Madox* observes, that by those acts, honours were created in name, and these places acquired some of the properties of honours, but, in truth, became honours of a new sort : for the essential and distinguishing property of an honour, vested in the king, was, to be a barony escheated. Now, if *Hampton Court* was not an escheat, or barony escheated, before the making of the act, it could not become an escheat or barony escheated by the act, which could not alter its nature. If a manor or estate, vested in the crown, was a part of the king's original inheritance ; if it never was granted to an earl or baron, and did not come to the crown by escheat, it was not properly an honour. It might indeed be created an honour, or rather a nominal honour ; but such creation could not alter the nature of it, or make it an honour in fact ; that is, it would not make it a baronial estate, if it never was one before.

§ 22. Every honour had a capital seat or mansion-house upon it ; which was called *caput honoris* or *baronia*, and was commonly a castle. Mr. *Madox* has cited a record in the second year of king *John* ; in which *Elias Croc* prayed he might have the judgment of the king's court, whether his father could alien that fee to his brother. *Desicut feodum illud est baronia, et caput illius honoris*. “ Not that it was an entire barony in itself, for one knight's fee could not amount to a barony ; but that it was a barony, to wit, a baronial fee, not barely a knight's fee. As,

“ if he had said, inasmuch as the said fee is baronial,
 “ and not only so, but even the capital seat of the
 “ honour or barony.”

Idem.

§ 23. A city or town could not be the head of a barony: when a town was part of a barony, it was considered as part of the demesnes of the barony; but, if there was a castle there, it was usually the head of the barony. Thus, the town of *Richmond* in *Yorkshire*, was part of the demesnes of the honour of *Richmond*; but the castle was the *caput honoris*.

2 Inst. 7.

§ 24. Lord *Coke* has said, that, to constitute a barony, thirteen knight's fees and a quarter were necessary; but this assertion is founded on the authority of an antient manuscript, intituled, *De modo tenendi Parliamentum*; of which, the authenticity has been fully disproved by *Prynne* and *Selden*, the latter of whom has shewn, that a barony did not consist of any particular number of knight's fees.

Id. f. 26.

§ 25. When the practice of sub-infeudation was adopted, the great lords called their immediate vassals barons; and, in course of time, the name of baron was given to the tenants of earls palatine, and also to the inhabitants of great towns. Thus, the Earls of *Chester* had their barons, and also the city of *London* and the *Cinque Ports*. The parliamentary barons were, therefore, called *barones regis*, to distinguish them from those inferior barons.

4 Inst. 211.
 Coll. 108.
Madox, Bar.
Ang. 133.

§ 26. It is stated by *Matthew Paris*, that soon after the conquest, the lands of the bishops and great abbots, which had been held before in *frankalmoigne*, were, by the authority of the whole legislature, declared to be baronies, and bound by the same obligations of homage and military service, as the civil tenures of the same kind. In consequence of this alteration, the bishops and great abbots became tenants *in capite per baroniam*; and were of course bound to attend the king's high court of parliament. It is, however, probable, that the bishops and abbots did not willingly acquiesce in the king's right of compelling them to attend parliament: for, when the immunities of the church were so much restrained at *Clarendon*, it was expressly enacted, that all ecclesiastics, who held their lands of the king, should attend parliament. *Archiepiscopi, episcopi, et universæ personæ, qui de rege tenent in capite, habeant possessiones suas de rege sicut baroniam; et inde respondeant justiciariis et ministris regis; et sequantur et faciant omnes consuetudines regias; et, sicut ceteri barones, debeant interesse judiciis curiæ regis cum baronibus; quousque perveniatur ad diminutionem membrorum, vel ad mortem.*

Sub Anno
1070.

Selden, Id.
f. 20.
4 Inst. 45.
1 Inst. 70
b. n. 2. 97 a.

§ 27. Lord *Coke*, however, observes, that unless an ecclesiastical person holds *per baroniam*, the king has no right to summon him to parliament; and consequently he is not bound to obey such summons, because *quoad secularia* he is *mortuus in lege*, and therefore not capable to have a voice in parliament, unless he held *per baroniam*. And, though such a prelate regular had been often called by writ, and had *de facto* had voice

4 Inst. 44.
Coll. 111.

and place in parliament; yet if in *rei veritate* he held not *per baroniam*, he ought to be discharged of that service, and to sit in parliament no more.

§ 28. The name of dignity, next in point of antiquity, is that of earl or *comes*; which was also introduced here from *France*, after the establishment of the *Normans*. From that time to the reign of *Henry 3.* baron and earl were the only names of dignity or titles known; for, in the second chapter of *Henry the third's Magna charta*, that prince says,—*Si quis comitum vel baronum nostrorum, sive aliorum tenentium de nobis in capite*;—from which Lord *Coke* concludes that, if any other name of dignity had been known at that time, it would have been mentioned.

§ 29. The ancient earls were usually appointed to the government of the particular counties, from which their titles were taken. The word *comes* is probably derived from *comitatus*: for, in all the ancient charters of creation of earls, of which *Selden* has published several, there is a grant to the earl of the third penny of the revenues of the county.

§ 30. Thus, in the charter by which the empress *Maud* granted the earldom of *Effex*, the words are—*Do et concedo Gaufrido de magna villa pro servitio suo, et hæredibus suis post eum hæreditabiliter, ut sit comes de Effexia, et habeat tertium denarium vicecomitatús de placitis, sicut comes habere debet in comitatu sua.*

Rot. Claus.
8 Edw. 3.
m. 11. & m. 8.
in dorso.

§ 31. Upon the death of *Isabella De Fortibus*,
21 Edw. 1. the earldom of *Devon* devolved upon *Hugh*

De

De Courtenay her cousin. He demanded and received the *tertium denarium*, but did not assume or use the title of earl, but was summoned to parliament regularly as a baron by the style of *Hugo De Courtenay* from 27 *Ed. 1.* to 8 *Ed. 3.* The treasurer and barons of the exchequer at length refused to pay him, as he did not claim it *nomine comitis*. Upon this, he petitioned the king, who ordered that he should take the title and receive the money, and from this time (9 *Ed. 3.*) he is regularly summoned as earl of *Devon*.

9 *Edw. 3.*
m. 32. m. 35.
in dorso.

§ 32. The possessions of an earl were formerly called his honor, as well as those of a baron: and, when they came into the hands of the king by forfeiture or escheat, they were usually distinguished from the other possessions of the crown, by the name of *honores comitum*. So, when a new earl was created of such earldom forfeited or escheated, the possessions or honor were usually granted to him by the name of *honor comitatus*: and, in the charters of creation of earls, a clause was frequently inserted, enabling them to hold all or a part of their estates *sub comitali honore*; by which those lands became parcel of their earldoms.

Seld. Id. f. 11

§ 33. Thus, *Selden* mentions that, in the charter, by which king *Richard 2.* created *Henry Percy* earl of *Northumberland*, is the following clause: *Volentes ulterius de gratiâ nostrâ speciali quod omnia castra, dominia, terra et tenementa, quæ idem Henricus jure hæreditario vel acquisitione propriâ præantea tenuit et possedit, vel imposterum est habiturus, sub honore comitali et tamquam parcella dicti comitatus, de cetero teneantur.*

Id. f. 10.

§ 34. One of the most ancient earldoms in *England* was that of *Richmond*; which was created by the Conqueror, by a grant of a considerable tract of land in the northern part of *Yorksire*, to *Alan* the son of *Eudo*, earl of *Britanny*; who thereby became earl of *Richmond*: and the possessions, thus granted, are still known by the name of the Honor of *Richmond*.

§ 35. Another dignity or title of honor is that of viscount; which is of much more modern date, and was first introduced by *Henry 6.*, who created *John* lord *Beaumont* viscount *Beaumont*. The words of creation are: *Nomen vicecomitis de Beaumont imponimus, ac ipsum insigniis vicecomitis de Beaumont realiter investimus; locumque in parliamentis, consiliis, et aliis congregationibus nostris, super omnes barones regni nostri assignavimus eidem.*

§ 36. The next name or title of dignity is that of marquis; which was derived from the employment of lord marcher, whose duty it was to guard the *marches* or borders of the kingdom. The first person, on whom this title was conferred, was *Robert de Vere*, earl of *Oxford*; who was created marquis of *Dublin* by *Richard* the second, in the eighth year of his reign.

§ 37. The next eminent title of dignity is that of duke, *dux*; of which the first created in *England* was *Edward* the black prince, to whom his father granted the dutchy of *Cornwall*; and at the same time conferred on him the dignity of duke of *Cornwall*.

§ 38. With

§ 38. With respect to the various modes of creating dignities, or titles of honor, it has been shewn that all dignities were originally annexed to the possession of certain castles, lands, or hereditaments; and were therefore created by the grant and investiture of such castles, lands, or hereditaments. These acquired the names of earldoms or baronies by tenure; and some of them are supposed to be still existing.

Of Dignities
by Tenure.

§ 39. It appears from the rolls of parliament, 11 and 12 Hen. 6., that *John* lord *Maltravers* claimed to have place in parliament as earl of *Arundel*; considering that his ancestors earls of *Arundel*, as lords of the castle, honor, and lordship of *Arundel*, had their place in parliament time out of mind, by reason of the said castle, honor, and lordship, to which the said name and title of an earl had been annexed; and shewed, that he was then seised of the said castle, honor, and lordship. The duke of *Norfolk*, who was at that time a minor, presented a petition; shewing that the said castle and dignity belonged to him by inheritance. The counsel of lord *Maltravers* exhibited his title to the castle of *Arundel*, under a special intail: and, after mature deliberation, it was resolved that he was entitled to sit in parliament as earl of *Arundel*, and in the ancient place of the earls of *Arundel*.

Rot. Parl.
v. 4. 441.
Dugd. Bar.
vol. 1. 322.

§ 40. It also appears from the rolls of parliament, 27 Hen. 6., that, in consequence of a dispute between the earls of *Arundel* and *Devon*, respecting their precedence, the judges declared, that the earl of *Arundel* was seised of the castle, honor, and lordship of *Arundel*, whereto

Rot. Parl.
vol. 5. p. 148.
Dugd. Bar.
vol. 1. p. 323.

whereto the name, estate, and dignity of earl of *Arundel* was, and time out of mind had been, united and annexed; and by that reason he bore and had that name, and not by way of creation; whereupon it was enacted that the said earl of *Arundel* should retain his pre-eminence by reason of the said castle, honor, and lordship of *Arundel*, as worshipfully as any of his ancestors, earls of *Arundel*, above the said earl of *Devon* and his heirs.

Coll. 115.

§ 41. *Thomas de Beauchamp*, earl of *Warwick*, by a fine levied in 18 *Edw.* 3., settled the castle and manor of *Warwick*, with divers other possessions, on himself for life, remainder to *Guy* his eldest son, and the heirs male of his body; remainder to *Thomas* his second son, and the heirs male of his body. *Guy* died without male issue, leaving two daughters: afterwards *Thomas* the settlor died; upon which *Thomas* his second son entered into the castle and manor or *Warwick*, and was earl of *Warwick* by reason of the aforesaid intail.

Dugd. Bar.
vol. 1. 361.

§ 42. Upon the death of *Thomas* lord *Berkley* in 5 *Hen.* 5. it was found by inquisition, that the castle and manor of *Berkley* were entailed by the grandfather of the deceased, by a fine levied in 23 *Edw.* 3. on himself and the heirs male of his body; and, as the deceased left only a daughter, they descended on *James de Berkley*, as cousin and next heir to the deceased. And *Dugdale* observes, that this *James*, by virtue of the said intail, enjoyed the castle and barony of *Berkley*, and was summoned to parliament in 9 *Hen.* 5., and
to

to all the parliaments that were held in the time of Henry 6. Id. 363.

§ 43. It also appears from *Dugdale's Baronage*, that Vol. 1. p. 365.
William lord Berkley, having no children, and taking occasion to except against his brother *Maurice*, for not marrying with a person of honorable parentage; by an indenture dated 10 December, 3 Hen. 7. covenanted to assure the castle and manor of *Berkley*, for want of issue of his own body, unto king *Henry 7.* and the heirs male of his body; and for default of such issue, to his own right heirs; and settled the same accordingly: in consideration of this, he obtained the office of earl marshal, and title of marquis, to himself and the heirs male of his body. *William* lord and marquis of *Berkley* dying without issue, and the castle and manor of *Berkley* having thereby vested in the crown, *Maurice de Berkley*, the brother and heir of *William*, never had or enjoyed the barony of *Berkley*; but, having recovered several other estates belonging to the family, he died in 22 Hen. 7. leaving issue *Maurice* his eldest son, who was summoned to parliament in 14 Hen. 8. But he had not the place of his ancestors, in regard that the castle of *Berkley* and those lordships belonging thereto, which originally were the body of that ancient barony, then remained in the crown, by virtue of the intail; and therefore sat in parliament merely as a new baron, in the lowest place: of which, says *Dugdale*, he had no joy, considering the eminency of his ancestors, and the precedence which they ever had; though, in point of prudence, he was necessitated to submit, being thereunto persuaded by his counsel.

counsel. Upon the death, however, of *Edward 6.* (who was the last heir male of *Hen. 7.*), the reversion of *Berkley* castle, and all the estates given to that king, fell into the possession of *Henry de Berkley*, as right heir of *William* lord and marquis *Berkley*; in consequence of which he was summoned to parliament in 4 and 5 *Phil.* and *Mary*, and was seated in the place of the ancient barons of *Berkley*.

Lords' Jour.
vol. 1. 516.

§ 44. The last case, in which the right to a dignity by tenure was claimed, and allowed, was that of the barony of *Abergavenny*, in the year 1604, 2 *James 1.* Sir *Thomas Fane*, having married *Mary* the only daughter and heir of *Henry* lord *Abergavenny*, claimed the barony of *Bergavenny*; and shewed that king *Richard 2.* caused his writ of summons to be directed to Sir *William Beauchamp* to attend his parliament at *York*; where he appeared and sat in the said parliament as a baron. That the said dignity descended to *Henry Nevill*, the father of the said *Mary*; who, therefore, as his heir general, became entitled to the dignity.

Edward Nevill, who was nephew and heir male to *Henry* the last lord *Bergavenny*, claimed the dignity under the will of *George* lord *Bergavenny*, made in 27 *Hen. 8.*, by which he entailed the barony of *Bergavenny*, and all other his castles, lordships, honors, &c. on himself and the heirs male of his body, remainder to Sir *Edward Nevill* and the heirs male of his body; and deduced his pedigree as heir male of the body of the said Sir *Edward Nevill*. The case was argued in the house of lords for seven days. Serjeant

Collins, 113.

jeant *Doddridge*, who was counsel for *Edward Nevill*, said, that those, who denied the existence of baronies by tenure, objected, first, that the grantee of them must hold by the same tenure, namely *per baroniam*; and, therefore, if a grant of them were made to persons ignoble, they would become noble, which would be absurd. Secondly, it was evident that many manors, which in former times were holden *per baroniam*, were then in the possession of mean persons; who never claimed the title of barons. Thirdly, that there were some ancient barons, who had sold their castles, and yet retained their dignities. To these objections the Serjeant answered; first, that if a baron by tenure aliened without licence, he forfeited his estate, which was seized by the king; and so the dignity was extinguished. If he aliened with licence, such alienation was made, either for the continuance of the dignity in his blood, by entailing it to some branch of his family, or to a stranger: in the first case he mentioned several instances, where the dignity was allowed to pass, and be enjoyed by the alienee; particularly those of the earldoms of *Warwick*, *Arundel*, and *Berkley*, which have already been stated. And, in the second case, he mentioned several instances, where the alienee had borne the name and dignity of a baron, in respect of such barony so aliened; and where such alienee had no dignity before, he had in respect of that, been summoned to parliament, and enjoyed the dignity. To the second objection, he answered, that it was true, ancient baronies were in the hands of persons ignoble; but the reasons were twofold: 1st, because they had been aliened by licence to them; 2d, such manors had

Coll. 116.

Vide infra.
Barony of
Eincourt.

had come to the crown by way of reversion, escheat, or forfeiture, and were granted again, reserving other services. As to the third objection, that ancient barons aliened their castles, and still retained their dignities, he answered; that such baronies were created by writ, in which the persons summoned were named by the principal place of their abode; and, therefore, though they aliened their castle or manor, from which they were named, yet they retained their dignities.

Lords' Journ.
vol. 2 345.

It is said in the Journals, " that the question seemed
 " nevertheless not so perfectly and exactly resolved,
 " as might give clear and undoubted satisfaction to all
 " the consciences or judgments of all the lords, for
 " the precise point of right: and yet so much was
 " shewn and alleged on each part, as in the opinion
 " of the house, (if it might stand with the king's
 " good pleasure and grace), made them both capable
 " and worthy of honor. It was, therefore, moved,
 " and so agreed, that information should be given
 " unto the king's majesty of all the proceedings of
 " the said court in this matter; and that humble
 " suit should be made to his majesty from the lords,
 " for the ennobling of both parties, by way of resti-
 " tution, the one to the said barony of *Bergavenny*,
 " and the ancient place belonging to the same, and the
 " other to the barony of *Le Despenser*." King James
 agreed to the proposal of the house of lords, but ne-
 vertheless required the lords to proceed to determine,
 upon which of the said candidates the dignity of the
 barony of *Bergavenny* should in their judgments be
 settled.

settled. The question was proposed by the lord chancellor, whether the heir male should have the dignity of *Bergavenny*; and it was resolved by the greater number of voices for the heir male, that *Nevill* should be restored to the barony of *Bergavenny*, and settled therein. A writ of summons was, in consequence, issued to *Edward Nevill*; in conformity to which he took his seat in the house of lords, as baron *Bergavenny*.

§ 45. The manor of *Kingston Lisle*, in the county of *Berks*, was formerly a barony, to the possession of which was annexed the title and dignity of baron and lord *Lisle*.

This appears from letters patent under the great seal, 22 Hen. 6. by which that prince, reciting that *Warinus* lord *Lisle* was seised of the manor of *Kingston Lisle*, from whom it descended to Sir *John Talbot*, as one of his heirs: and reciting, that the said *Warinus* and all his predecessors, on account of the said lordship and manor, had enjoyed the name and dignity of baron and lord *Lisle*, from time immemorial, and had place in all parliaments as other barons of the realm of *England*; granted to the said *John Talbot*,—*Quod ipse et hæredes sui, domini dictorum dominii et manerii de Kingston Lisle, ex nunc domini et barones de Lisle, ac barones, nobiles, et proceres regni nostri habeantur, teneantur et reputentur, &c. &c. prout prædictus Warinus, seu aliquis alius baroniam et dominium prædict, habens et occupans, habuit et tenuit, &c. habendum, &c. eidem Johanni hæredibus et assignatis suis in perpetuum, &c.*

By

By another charter, 15 *Edw.* 4., reciting as in the former charter, and that *Edward Grey* was seised in right of *Elizabeth* his wife, who was the grand daughter and heir of the said *John Talbot*, of the lordship and manor of *Kingston Lisle*; that prince grants to the said *Edward Grey* the title and dignity of *Baron Lisle*, *habendum* to the said *Edward* and his heirs by the said *Elizabeth*.

Collins, 287. § 46. In the case of the barony of *Fitzwalter*, heard before the Privy Council in 1669, the counsel for one of the claimants affirmed, that the same was a barony by tenure, and ought to go along with the land; which was denied by the counsel on the other side, who offered to argue upon the same: “ Upon which, “ both parties being ordered to withdraw, and the “ nature of a barony by tenure being discoursed; it “ was found to have been discontinued for many “ ages, and not in being, and so not fit to be revived, “ or to admit any pretence of right of succession there- “ upon: and, the pretence of a barony by tenure “ being declared, for weighty reasons, not to be in- “ fisted on, the counsel were called in,” &c.

§ 47. It is, however, observable, that, when the burthenfome part of the feudal tenures was abolished by the statute 12 *Car.* 2., care was taken not to destroy feudal dignities, by a proviso, (§ 11.), which declares, that nothing in that act “ shall infringe or hurt any “ title of honour, feodal or other, by which any per- “ son had or might have a right to sit in the Lords’ “ House of Parliament, as to his or their title of ho-

“nour or sitting in Parliament, and the privileges
“belonging to them as peers.”

§ 48. The second mode of creating dignities is by writ. In which case, the king issues his writ of summons to a person, requiring him to come and attend his parliament on a particular day, and there to consult with the peers of the realm on certain matters. This mode of creating dignities, is generally supposed to have been adopted in the 49th year of *Hen. 3.* : for, in consequence of the barons' wars, (which took place during that reign), a great number of the antient nobility was destroyed ; and, therefore, when a parliament was called by him at *Winchester*, and afterwards at *Westminster*, he, to increase that order, issued his writs to several persons, who did not hold their lands *per baroniam*.

Of Dignities
by Writ.

Coll. 118.

§ 49. *Selden* observes, that, in consequence of the practice of summoning persons to parliament, who did not hold *per baroniam*, barons became divided into two kinds, barons by writ and tenure, and barons by writ only. Barons by writ and tenure, were such as, having possession of their antient baronies, were called by several writs to parliament, according to the stipulations contained in king *John's* charter respecting the *barones majores*. Barons, by writ only, were such as were called by a like writ of summons, although they had no possessions of the description of honorary baronies. And *Sir William Blackstone* observes, that, in consequence of this practice, actual proof of a tenure by barony became no longer necessary to constitute a lord of parliament ;

Id. l. 22.

1 Comm. 400.

liament; but the record of the writ of summons, to him, or his ancestors, was admitted as sufficient evidence of the tenure.

The Person
summoned
must sit.

§ 50. A writ of summons has not the effect of conferring a dignity on the person summoned, until he has actually taken his seat in parliament by virtue of the writ: so that, where a person was summoned to parliament by writ, and died before the meeting of parliament, it was held that he was not a peer.

Lord Aber-
gavenny's
Case,
12 Rep. 78.
1 Inst. 166.

§ 51. A question arose in the parliament, holden 8 Jac. 1., whether *Edward Nevill*, who was called by writ to parliament in the 2 and 3 *Mary*, and died before the parliament met, was a baron or not. And it was resolved by the Lord Chancellor, the two Chief Justices, Chief Baron, and divers other justices there present, “ that the direction and delivery of the
“ writ did not make him a baron or noble, until he
“ came to parliament, and there sit according to the
“ commandment of the writ; for, until that, the writ
“ did not take its effect. And, in 39 *Hen. 6.*, he is
“ called a peer of parliament, which he cannot be
“ until he sits in parliament; and he cannot be of the
“ parliament, until the parliament begin. And, for-
“ asmuch as he hath been made a peer of parliament
“ by writ, (by which implicitly he is a baron), the
“ writ hath not its operation and effect until he sit in
“ parliament, there to consult with the king and the
“ other nobles of the realm: which command, by his
“ superseas, may be countermanded; or the said
“ *Edward Nevill* might have excused himself to the
“ king,

“ king, or he might have waived it, and submitted to
 “ his fine, as one who is distrained to be a knight, or
 “ one learned in the law, is called to be a serjeant:
 “ the writ cannot make him a knight or a serjeant.
 “ And, when one is called by writ to parliament, the
 “ order is, that he be apparelled in his parliament-
 “ robes; and his writ is openly read in the upper-
 “ house, and he is brought into his place by two
 “ lords of parliament; and then he is adjudged in law
 “ *inter pares regni.*”

§ 52. The proof of a sitting in parliament, by vir-
 tue of a writ of summons, must be by the records of
 parliament: for Lord *Coke* says, if issue be joined in any
 action, whether a person be a baron, &c. or no, it shall
 not be tried by a jury, but by the record of parliament.

What Proof
 necessary.

1 Inst. 16 b.

§ 53. In the case of *Norborne Berkeley Esq.* claim-
 ing to be one of the coheirs of the antient barony of
Botetourt, the proofs of the sitting consisted of antient
 records of parliament; and the following observations
 on that evidence are stated in the case, which is signed
 by the honourable *Charles Yorke*. “ If any objection
 “ can be framed to these records, as evidence of a
 “ sitting in parliament, such objection must be taken,
 “ either to the competency, or to the effect, of such
 “ evidence. An objection to the competency of the
 “ evidence can only take its rise from its being usual,
 “ in claims of this nature, to prove the sitting by the
 “ journals of the House of Lords; from whence it
 “ may possibly be inferred, that no other evidence is
 “ admissible to prove a sitting in parliament.

Hob. 110.

“ Answer 1.—It has never been laid down, that
 “ the sitting in parliament must be proved by the
 “ journals of the House of Lords; but all the autho-
 “ rities agree in establishing this rule, that the sitting
 “ must be proved by the records of parliament. The
 “ House of Lords has, in questions of this nature,
 “ given credit to their journals, where a sitting could
 “ be proved by them. But that practice, which seems
 “ rather an indulgence to the claimant, can never be
 “ construed to establish the authority of the journals
 “ above that of the records. For, in strictness, jour-
 “ nals are not records, but remembrances for form of
 “ proceeding to the record: they are not of necessity,
 “ neither have they always been. They are not any
 “ record, but notes and memorials for the clerks to
 “ perfect, and enter the records. But the evidence
 “ here stated, is that of the records of parliament, the
 “ first record being strictly an act of parliament, and
 “ the others, full and complete records of transactions
 “ in parliament, all entered upon the proper rolls,
 “ and produced from the public archives. It is there-
 “ fore evidence, not only of an equal, but, in most
 “ cases, of a superior authority to the journals; and,
 “ in this question, it is strictly and properly that evi-
 “ dence, which the law requires to support the inhe-
 “ rance of a peerage.

“ Answer 2.—The state of the journals is such, that
 “ this objection could not be allowed, without great
 “ danger to the antient baronies. There are no jour-
 “ nals before the reign of *Hen. 8.*, nor are they regu-
 “ larly

“ larly preserved since that reign. An antient letter,
 “ prefixed to the journal-book of *Hen. 8.*, intimates,
 “ that several journals were taken away, and suppressed
 “ by Cardinal *Wolsey*. It does not seem reasonable,
 “ that either this accident, or the neglect of a clerk
 “ to the journals, should be of any prejudice to the
 “ nobility in the inheritance of their honours; and
 “ yet, if no barony could be claimed without proof
 “ of a sitting by the journals, all those antient ba-
 “ ronies, which have been united with higher honours
 “ before the reign of *Hen. 8.*, or during those years
 “ of which the journals have been suppressed, must be
 “ lost.

“ Answer 3.—Baronies have, in fact, been allowed,
 “ though no sitting could have been proved by the
 “ journals. In the case of the barony of *Ruthin*,
 “ 1640, the claim to that barony was allowed, upon
 “ great deliberation, and very accurate inquiry; though
 “ it is evident, no sitting could have been proved by
 “ the journals, because there was no person summoned
 “ under that title from the 2d year of *Edw. 4.*; the
 “ Lord *Grey of Ruthin* being soon afterwards created
 “ Earl of *Kent*. The barony of *Mowbray* was re-
 “ vived without objection in favour of *Henry*, eldest
 “ son of the Earl of *Arundel*, though no person had
 “ been summoned under that title from the 39th of
 “ *Edw. 3.* *Algernon*, Duke of *Somerſet*, took his seat
 “ in the House of Peers as baron *Percy*, upon the
 “ death of his mother in 1722, without objection;
 “ though no sitting could have been shewn from the
 “ journals,

“ journals, no person having sat in right of the old
 “ barony of *Percy*, from the 50th year of *Edw.* 3.
 “ And, lastly, no sitting can be proved by the jour-
 “ nals, in the case of the barony of *Le Despencer*.”

Descendible
to Females.

§ 54. Although the writs of summons to parliament, whether addressed to persons who were not at the time peers of parliament, or to antient barons, (for in both cases the writ is exactly similar), do not contain any words of limitation (except in one instance, which will be hereafter mentioned), to the heirs of the person summoned; yet it appears to have been long settled, that, where a person has been summoned to parliament by the usual writ, and takes his seat by virtue of such writ, the dignity thus acquired is descendible to all his posterity.

1 Inst. 96.
166.

Lord *Coke* was clearly of this opinion; having laid it down as fully settled, that, where a person is summoned to parliament by writ, and takes his seat, his blood is ennobled to him and his heirs lineal.

Collins, 24.

§ 55. The case, upon which Lord *Coke* appears to have relied in support of this opinion, is that of the barony of *Dacre*; which, on the death of *Gregory Lord Dacre*, 36 *Eliz.*, was declared and adjudged by commissioners, nominated by queen *Elizabeth*, to have descended to *Margaret* his sister and sole heir, who was married to *Sampson Leonard*: and in 2 *James*, this determination was confirmed by the Lords Commissioners for executing the office of Earl Marshal.

§ 56. This doctrine, however, has been controverted by Mr. Prynne, Mr. Elfyng, and the Author of the “ Inquiry into the Manner of creating Peers.”

Their arguments may be reduced to the following :
 1st, They observe that, in the usual writ of summons to parliament, neither the words baron, barony, nor heirs, are to be found. And, as the king cannot, by his letters patent, create any man a baron or peer in fee, or in tail, without express words of creation, in the patent, for that purpose ; and, as in all the patents which have passed since the 20th year of *Hen. 8.*, there is not only a special clause inserted for creating the patentees barons, but also, for enabling them and their heirs, or the heirs of their bodies, to hold and possess a feat and place in parliament, it seems equally necessary, that special words of creation should be inserted in writs of summons ; such as was practised in the case of Sir *Henry Bromflete*, who being summoned to parliament in 27 *Hen. 6.*, this clause was inserted in his writ. *Volumus enim, vos et haredes vestros masculos, de corpore vestro legitimé excentes, Barones de Vesey existere.*

Infra.

1 Inst. 9 b.
 7 Rep. 33 b.

2d, If a writ of summons alone ennobled the person and his descendants, then were all the judges, the king's serjeants at law, the masters in chancery, and several other persons, ennobled : for they received writs of summons to parliament, nearly similar at one period, and perfectly similar at another, to those which were issued to the earls and barons, and attended par-

liament in pursuance of such writs, yet never claimed to be peers.

Dugd. Sum.
Pref. 1d.
Baronage,
V. 2. Pref.

3d, It appears from the records of the antient writs of summons to parliament, that, during the reigns of *Edw.* 1., 2., and 3., some persons received writs of summons to parliament only once; some twice, or more times; and some during their lives, but not their descendants.

§ 58. It would, perhaps, be impossible, to give a satisfactory answer to the arguments above stated, respecting writs of summons; nor has it hitherto been attempted. Indeed, the circumstance of persons having been once or twice summoned to parliament, and afterwards omitted, is sufficiently strong to warrant the opinion, that something more than a writ of summons to parliament, and a sitting in pursuance of it, was formerly necessary to create an hereditary dignity. And the opinion of Mr. *Elfyng*, (who was clerk of parliament in the reign of king *James* 1., and conversant in antient records), that investiture of robes was also necessary, to ennoble the person summoned, and his descendants, appears extremely probable.

Vol. 2. 390.

§ 59. In *Dugdale's Baronage*, it is stated, that *William Paget* being called by writ to the parliament then sitting, (4 *Edw.* 6.), by the name of Lord *Paget of Beaufort*, he took his place there among the rest of the peers: after which, upon the 19th of *January* next ensuing, he had his solemn creation to that honour.

§ 60. It

§ 60. It is also mentioned in the same work, that *James de Fienes*, by reason that *Jaam* his mother was third sister and coheir to *William de Say*, by a special writ, 26 Hen. 6., had summons to that parliament, by the title of Lord *Say and Sele*: whereupon, the third day after, in consideration of his eminent services, he was in open parliament there, by the assent of the Lords Spiritual and Temporal, advanced to the degree and dignity of a baron of the realm, by the name and title of Lord *Say and Sele*. And, it is remarkable, that this Lord *Say and Sele* was regularly summoned to parliament till his death, and his son and heir was also summoned, and sat as long as he lived. The grandson was never summoned. But, in the *Inquisitio post Mortem*, he is styled *Henricus de Fenys Dominus de Saye*. Three more generations passed on without a writ, and then Sir *Richard Fenys* petitioned king *James I.*, who recognized and confirmed to him, and the heirs of his body, the dignity of Baron *Saye and Sele*.

Cafe of the
Barony of
Saye and
Sele, Dom.
Proc. 1781.

§ 61. Lord *Lyttleton*, who studied the early part of our history with great attention, says, that the omissions in summoning persons, who had been called to parliament by writ, or their descendants, may, in many cases, (though not in all), be accounted for, from the frequent and necessary absence of many of the peers on the king's service abroad, while the crown had great dominions, and almost perpetual wars on the continent: for, on such occasions, the omitting to summon them to parliament was no encroachment

Hist. of Hen.
2. Vol. 3.
p. 382.

on

on their rights, but a proper exemption from a duty they could not perform. It might also have been done, not improperly, according to the notions of those times; when the lands, that constituted a barony, were seized by the crown for any default or defect of service, during the life of the baron.

§ 62. It should also be observed, that attendance on parliament was, at the period above referred to, considered as a burthenfome service, from which, many might solicit to be relieved.

Bar. V. 2. 17.

§ 63. Thus, *Dugdale* mentions, that *John la Warre* had summons to parliament, from 44 *Edw.* 3. till 21 *Rich.* 2., and then obtained a special dispensation to be exempt from coming to any future parliaments : and that *Thomas de la Warre* (in 3 *Hen.* 4.) procured a special dispensation from attending the king in any of his parliaments or councils, for the space of three years.

Idem.

§ 64. But, however strong the objections to Lord *Coke's* doctrine may appear, there can be no doubt but that it was fully settled, when he wrote, that a writ of summons to parliament, and a sitting in pursuance of such writ, (except in the case of a spiritual person), operated as a creation of a dignity, and rendered it descendible to the lineal heirs, male and female, of the person first summoned ; and this point has been confirmed by so many subsequent decisions, that it is not now to be shaken.

§ 65. In 1673, *Catharine Lady O'Brien* claimed the barony of *Clifton of Leighton Bromswold*. This petition having been referred to the House of Lords, the committee of privileges reported, “ That *Jervas* Lord *Clifton* was summoned by writ to parliament, “ 6 Jac. 1., by the title of Lord *Clifton of Leighton Bromswold*, so as the barony, being a fee-simple, “ ought to descend from the said Lord *Clifton* upon “ his heirs : and that the Lady *Catharine O'Brien*, “ the petitioner, being the heir gradually and lineally “ descended from the said Lord *Clifton*, the barony “ did, of right, descend to her and her heirs.”

It was ordered, that the judges should give their opinion on this case, which they accordingly did, on the 7th of *February*, in the following words.

The Lord Chief Justice of the King's Bench, Lord Chief Justice of the Common Pleas, Chief Baron, Baron *Turner*, Baron *Littleton*, Justice *Atkins*, Justice *Ellis*, and Baron *Thurland*, were unanimous in their opinions :

Lords Journ.
Vol. 12. 629.

“ That, taking the case in fact to be, as his Majesty's Attorney General had reported it to be, and, “ as it stands transmitted to this house, they find “ it to be thus as to this Lady's claim of the said “ barony.

“ That Sir *Jervas Clifton* was summoned to parliament by the name of *Jervas Clifton of Leighton Bromswold*, by writ dated July 9th, 9 Jac. 1., &c.

“ That,

“ That, accordingly, he did come and sit in parliament, as one of the peers of *England*.

“ That he died 16 *Jac.* 1., leaving issue behind him
 “ *Catharine*, his sole daughter and heir; who married to the Lord *Aubigny*, afterwards Duke of
 “ *Lenox*.

“ That the said Duke, 17 *Jac.* 1., was, by letters
 “ patent, created Baron *Leighton* of *Leighton Bromf-*
 “ *wold*, to him and the heirs male of his body, where-
 “ of none are now living.

“ That the petitioner is lineally descended from
 “ him, and is his heir, (by the said report); and, as
 “ such, now claims the barony of *Clifton*.

“ All which being admitted to be true, they are
 “ of opinion,

“ First, that the said *Jervas*, by virtue of the said
 “ writ or summons, and his sitting in parliament accordingly, was a peer and baron of this kingdom,
 “ and his blood thereby ennobled.

“ Secondly, that his said honour descended from
 “ him to *Catharine*, his sole daughter and heir, and
 “ successively, after several descents, to the petitioner,
 “ as lineal heir to the said Lord *Clifton*.

“ Thirdly, that therefore the petitioner is well entitled to the said dignity.

“ Upon

“ Upon confideration had by this houfe, &c. It
 “ is refolved by the lords fpiritual and temporal, in
 “ parliament affembled, that the faid *Catharine* lady
 “ *O’Brien* hath right to the barony of *Clifton*.”

§ 66. Notwithstanding this folemn declaration of the judges, and of the houfe of lords; the doctrine that a writ of fummons to parliament, and a fitting by virtue of fuch writ, created a dignity to heirs general, was again combated in the cafe of the barony of *Willoughby de Broke*; which was originally created by writ of fummons, in 7 *Hen. 7.*, and was claimed in 1694 by Sir *Richard Verney*, who derived his pedigree through a female heir. The attorney-general argued, that a fummons by writ did not create an eftate in fee: for that anciently feveral had been fo fummoned, and yet their fons had never been fummoned after them: nay, fometimes the very perfon, firft fummoned, had afterwards been omitted to be fummoned; and he infifted that, even in the time of *Henry 7.* when Sir *Robert Willoughby* was firft fummoned, it was not looked upon as an eftate in fee. Several of the peers, as the earls of *Lindfay*, *Thanet*, *Suffex*, and *Abington*, the lord *Delawarre*, &c. who had baronies by writ in them, (and fome of whom had at that time only daughters), looking upon themfelves as concerned, from what was mentioned in the committee in relation to the defcent of fuch baronies, moved the houfe, that a day might be appointed to confider of what had been mentioned by fome lords, on that day, in relation to the defcent of baronies by writ: and, a day being appointed, the faid lords were heard

Vide infra.

Lords' Jour.
 vol. 15. 442.
 458. 552.

Vide Coll.
Append.
No. 7.

Vide Claim of
the Barony of
Wentworth,
Lords' Jour.
vol. 17, 81,
91.

heard by their counsel. On another day, the attorney-general argued for the king against the descent of baronies by writ; to which the counsel for the lords replied, and produced several precedents, collected by Mr. King, *Lancaster* herald. The several heralds were afterwards heard, in relation to the descent of baronies by writ; and, the matter being reported by the lord keeper, the house of lords resolved, that where a person was summoned to parliament, by writ, and took his seat, he acquired a peerage, descendible, to his heirs lineal, whether male or female.

Ante, f. 56.

§ 67. The mode of descent may, however, be restrained by the writ of summons to males, exclusive of females; as appears from the writ, by which *Henry de Bromflet* was called to parliament.

Of Writs to
the eldest Sons
of Peers.

§ 68. It has, for some centuries, been a practice to call up the eldest sons of some peers to the house of lords, by the title of a barony vested in] their fathers; in which cases they have been allowed to take their place in parliament, according to the antiquity of the baronies, by the names of which they are summoned.

Lords' Jour.
vol. 4. p. 55.

§ 69. *Dugdale*, at the end of his summons to parliament, has given a list of those eldest sons of peers, who had been summoned in the lifetime of their fathers, by the titles of such honors as were then in their fathers, and had place and precedence according thereto. The first of these was *Thomas Arundel*, lord *Maltravers*, son to *Richard Fitzallan* earl of *Arundel*, in 22 *Edw.* 4. And it appears from the journals, that,

that, in 16 *Cha.* 1., *Henry Howard*, eldest son of the duke of *Norfolk*, was called up to the house of lords by writ of summons, by the title of lord *Mowbray*, which was the most ancient barony of the *Norfolk* family; and that he was placed first upon the barons' bench.

§ 70. This rule has been adopted in all other cases, in which the eldest son of a peer has been called to parliament by writ of summons, by the title of a barony then vested in his father.

§ 71. It has been determined, that a writ of summons of this kind creates a dignity, and renders it hereditary in the blood of the person so summoned.

§ 72. *Charles* lord *Clifford*, the eldest son of the earl of *Burlington*, was called to parliament by writ of summons, by the title of lord *Clifford* of *Launfburg*, (a barony which was then in his father), and took his seat accordingly. This *Charles* died in the lifetime of his father, leaving a son named *Charles*; who claimed to be lord *Clifford* of *Launfburg*, by descent from his father.

Lords' Jour.
vol. 25. p. 11.
39.

“ The lord president reported from the lords committee of privileges, to whom it was referred to consider, whether, if a lord called by writ into the father's barony shall happen to die in the lifetime of his father, the son of that father so called be a peer, and hath right to demand his writ of summons; that their lordships find no precedent in this case.”

“ A debate

“ A debate arising, whether *Charles lord Clifford*,
 “ (son and heir of *Charles late lord Clifford of Launf-*
 “ *burg*, deceased), who was called by writ to parlia-
 “ ment, in the lifetime of his father, the present earl
 “ of *Burlington*, hath right to sit in parliament; the
 “ house was of opinion. that the said *Charles lord*
 “ *Clifford*, hath right to a writ of summons to parlia-
 “ ment, as lord *Clifford of Launzburg* ;” and he took
 his seat accordingly.*

Lords' Jour.
 vol. 25. p. 11.

§ 73. *James*, duke of *Athol*, in the year 1736,
 claimed the dignity of baron *Strange*, stating that
 king *Henry 7.* had created *Thomas*, lord *Stanley*, earl
 of *Derby*, to him and the heirs male of his body.
 That the said title and dignity came by mesne descents
 to *Ferdinando* earl of *Derby* ; who died seised thereof,
 leaving three daughters. That the said *Ferdinando* did
 not die seised of any title or dignity of a baron, cre-
 ated by letters patent; and, whatever titles and dig-
 nities he had, which were created by any writ or writs
 of summons to parliament, descended to his said three
 daughters. That the said title and dignity of earl of
Derby, came to *William*, brother of the said *Ferdinando*,
 as heir male of the body of the said *Thomas* ; but the
 said *William* never was seised of the title or dignity of
 a baron.

That *James*, (the petitioner's ancestor, whose heir
 he was), eldest son of the said *William*, was summoned

* The same point was determined, in the case of lord *Hervey*.—
 Lords' Journ. vol. 25. p. 112. 130.

to parliament, 3 *Cha.* 1. as a baron, the writ being directed *Jacobo Strange Chevalier*; and, being also summoned to several succeeding parliaments, sat and voted by the title of lord *Strange*, in the lifetime of his father, the said *William* Earl of *Derby*.

That, upon the death of the said *William* Earl of *Derby*, the said *James* Lord *Strange*, succeeded to the said title and dignity of Earl of *Derby*, and died seised thereof, to him and the heirs male of the body of the said *Thomas* Earl of *Derby*; and of the said title and dignity of Lord *Strange*, to him and his heirs.

That the said title and dignity of Lord *Strange* came, by mesne descents, to the then late Earl of *Derby*, who died without issue in 1735.

That the said *James* Duke of *Athol*, was cousin and next heir to the said then late Earl of *Derby*, and great grandson of the said *James* Lord *Strange*, and consequently entitled to the said title and dignity of Lord *Strange*. The House of Lords resolved, that the petitioner was entitled to the said barony of *Strange*, created by the said writ in 3 *Cha.* 1. Lords' Jour.
Id. p. 39.

§ 74. *Richard* Earl of *Burlington*, in the year 1737, claimed the dignity of Baron *Clifford*; stating that *Robert de Clifford* was summoned to parliament in 28 *Edw.* 1. as a baron; and that the said barony came by mesne descents, to *Henry* Lord *Clifford*, who was created by king *Henry* 8. Earl of *Cumberland*, to him and the heirs male of his body. Lords' Jour.
vol. 25. p.
112.

That the said titles came, by mesne descents, to *George* Earl of *Cumberland*, who died, leaving only one daughter, the *Lady Ann* : by which the title and dignity of Earl of *Cumberland* came to Sir *Francis Clifford*, brother to the said *George*, as heir male of the body of the said *Henry*. But the said *Francis* never was seised of the title or dignity of a baron.

That the said barony of *Clifford* descended to the said *Lady Ann Clifford*, from whom it descended to the daughters and co-heirs of the then late Earl of *Thanet*; and was given by the king to *Margaret* Lady *Clifford*, one of the said co-heirs. That *Henry Clifford*, (the petitioner's ancestor), eldest son of the said *Francis* Earl of *Cumberland*, was summoned to parliament in the lifetime of his father, without any letters patent, in 3 *Cha.* 1., the writ being directed *Henrico Clifford Chevalier*, and sat and voted in that and several succeeding parliaments.

That the said *Henry* Lord *Clifford* left issue only one daughter, *Elizabeth*, who intermarried with *Richard*, Earl of *Burlington*, to which *Elizabeth* Countess of *Burlington*, the petitioner was great-grandson, and heir.

That therefore the title and dignity, created by the said writ of summons, in virtue of which the said *Henry Clifford* sat and voted in parliament, was descended to the petitioner, who was sole heir to the said *Henry* Lord *Clifford*. The House of Lords resolved,
that

that the petitioner was entitled to the barony of *Clif-ferd*, created by the said writ *

§ 75. It is observable that, in the two last cases, the claimants stated that the baronies, by the names of which they were summoned, were not then vested in their fathers; from which it may be inferred, that an opinion then prevailed, that there was some difference between the operation of a writ of summons to the eldest son of a peer, by the name of a barony vested in his father, and that of a similar writ, by the name of a barony not vested in his father.

§ 76. This idea was, probably, first suggested by the author of the “Enquiry into the Manner of creating Peers;” who, speaking of the practice of calling up the eldest son of a peer to the house of lords, by the title of a barony then in his father, says: “The writ of summons, therefore, seems not so much to be considered as the creation of a baron, but only as an instrument of conveyance, or method of transferring a barony or honour from one person to another. For, if it is not so, what reason can be given why the eldest son of one earl, summoned by the title of his father’s barony, shall have precedence according to the rank and antiquity of

Pa. 49, 50.

* There can be no doubt, but that the crown, in the two preceding cases, issued its writ of summons upon the idea that the baronies, by the names of which the persons were summoned, were then vested in their fathers. But this proving to have been a mistake, the House of Lords was obliged to admit, that the writs operated as new creations.

“ that barony. And that the eldest son of another
 “ earl, if he be by patent created to a title or barony
 “ foreign to his family, shall be considered as the
 “ youngest baron, and take his place in the house ac-
 “ cordingly. I speak, and I think every man ought,
 “ with great submission upon this subject. But, if I
 “ mistake not, the law even at this day is, that though
 “ the last of these persons takes a barony in fee, or
 “ otherwise according to the limitations of it; yet the
 “ first, upon whom the writ operates only by way of
 “ instrument of conveyance, has no other title in the
 “ barony than his father had, from whom it was con-
 “ veyed: and, therefore, if the father has only an
 “ estate tail in the barony, the state of the son,
 “ though summoned by writ, is not enlarged, nor
 “ made a fee, and descendible to his heirs general.”

The doctrine here laid down has been adopted by
 the house of lords in the following modern case.

5 Bro. Ca. in
 Parl. 509.

§ 77. King *James I.* created Sir *Robert Sydney*, Lord
Sydney of Penshurst, to him and the heirs male of his
 body; and afterwards created him Viscount *Lisle* and
 Earl *Leicester*. These titles descended to his grandson
Philip; whose eldest son *Robert*, by curtesy Viscount
Lisle, was in 1 *Wm. and Mary* summoned to parlia-
 ment by writ, and sat and voted by the title of Lord
Sydney of Penshurst, in the lifetime of his father.
 These titles descended to *John Sydney*, the son of *Robert*,
 who died without issue, leaving the daughters of his
 next brother, *Mary Sydney* and *Elizabeth Sydney*, his
 heirs general; and *Jocelyne*, his youngest brother,
 who

who became Earl of *Leicester*, and afterwards died without issue; by which the titles created by the letters patent became extinct. Upon the death of *Mary Sydney* without issue, *Elizabeth Sydney* (who had married Mr. *Perry*) claimed the barony of *Penshurst*, as sole heir of *Robert Sydney*, who was summoned to parliament by writ.

The attorney-general, (Mr. *Wallace*), stated in his report, that the petitioner claimed the barony of *Sydney of Penshurst*, as being the sole heir general of the body of *Robert Sydney*, who was called to parliament by writ in *vita patris*; upon a supposition that the effect and operation of the writ of summons to parliament, without letters patent, and his having sat in parliament in pursuance thereof, vested a title in him to the barony, descendible to his lineal heirs.

That a writ of summons to parliament, and a sitting in pursuance, did certainly, in general cases, ennoble the person and his descendants; but he conceived that the effect of a writ of summons to the eldest son of an earl or viscount, by the title of his father's barony, or to the eldest son of a baron, who had two or more baronies, to one of his father's baronies, was, to accelerate the succession of the son to the barony; which, on his father's death, would descend to him: and the extent of the inheritance depended upon the nature of his father's title to the barony, whether in fee, or in tail male.

That the usual manner of calling up the son of a peer in *vita patris* was, by writ of summons to the

Lords' Jour.
vol. 4. 35.
vol. 15. 523.

barony of the father ; and the persons thus called had been constantly placed in the House of Lords, according to the antiquity of their fathers' barony : although, since the statute 31 *Hen. 8. c. 10.* for placing the lords, whereby the precedency of peers was fixed and established, the right to such precedency had at different times come under the consideration of the house ; and, although it did not appear, that the house had determined the point, yet it was highly probable that the lords had satisfied themselves, that the eldest sons of peers, called up by writ into their fathers' baronies, were entitled to the same precedence and rights, which they would have been entitled to, if they had succeeded to the same by descent ; and that the calling them up by writ in their fathers' lifetime only accelerated the possession.

That he was of opinion, that the effect of the writ of summons to Sir *Robert Sydney*, to his father's barony, gave to him the like inheritance his father had in the barony, which was restrained to heirs male ; and that the petitioner was not, as heir general, entitled to the barony. But, as the case appeared anomalous, and never to have been precisely determined, he thought it advisable to refer it to the house of peers.

The case was accordingly referred to the house of lords ; and, after having been fully heard, it was resolved, that the claimant had no right in consequence of her grandfather's summons and sitting.

§ 78. Another mode of creating dignities is, by charter, or letters patent, under the great seal, by which the king grants to an individual a dignity or title of honour, and invests him with the dignity, by delivery of the charter, girding with a sword, &c.

Of Dignities
by Letters
Patent.

§ 79. This mode of conferring dignities appears to have been practised at a very early period. Thus, the Empress *Maud* conferred the earldom of *Hereford* on *Milo de Gloucester*, by a charter which has been published by *Rymer*, and is one of the most ancient extant. The operative words of this charter are—*Sciatis, me fecisse Milonem de Gloucestriâ comitem de Hereford, et dedisse ei motam de Hereford, cum toto castello, in feodo et hæreditate, sibi et hæredibus suis, ad tenendum de me et hæredibus meis. Dedi etiam ei tertium denariam redditus burgi Hereford quicquid unquam reddat, et tertium denarium placitorum totius comitatus Hereford.*

Coll. 122.
Ante, f.

Fœd. vol. 1.
p. 8.

Vincent,
No. 3. Coll.
Arm.

§ 80. King *Richard 1.* granted to *William* Earl of *Arundel*, the castle of *Arundel*, with all the honour of *Arundel*, *et tertium denarium de placitis de Suffex unde comes est,*

King *Henry 3.* gave to *Edmund* his son, *honorem comitatum castrum et villam de Lancafter.*

The same king gave the earldom or honour of *Richmond*, to his uncle *Peter* of *Savoy* and his heirs, *vel cuiunque de fratribus vel consanguineis suis ea dare vel assignare voluerit.*

Vol. 2. 273.

§ 81. It appears from the rolls of parliament, that, in 36 *Edw. 3.*, the chancellor declared to the parliament, that the king intended to advance to honour such of his sons as were of full age. That his son *Lionel*, who was then in *Ireland*, should be Duke of *Clarence*, to him and the heirs male of his body. That his son *John* should be Duke of *Lancaster*, and his son *Edmund*, Earl of *Cambridge*. After which the king, in full parliament, did gird his son *John* with a sword, and set on his head a cap of fur, and upon the same a circlet of gold and pearls; and named him Duke of *Lancaster*, and thereof gave him a charter.

In like manner, the king girded his son *Edmund* with a sword, and named him Earl of *Cambridge*, and thereof gave him a charter.

Vol 3. p 205.

§ 82. In the rolls of parliament, 9 *Rich. 2.*, there is an account of the confirmation of the charter, by which that king granted to his uncle, *Edmund* Earl of *Cambridge*, the dignity of Duke of *York*. The charter is recited, of which the operative words are—*In Ducem creximus, eidem Ducatús Eborum titulum assignantes, et nomen*. And the king, with the consent of parliament, confirmed it, and invested him with the dignity, by delivery of the charter, girding him with a sword, and putting on his head a cap of honour, and a circle of gold, or a coronet.

Rot. Parl.

Vol. 3. p. 250.

§ 83. In 11 *Rich. 2.*, the commons petitioned the king to confer some honour on his brother, Sir *John Holland*; in consequence of which, he, with the consent of

of parliament, created him Earl of *Huntingdon* by a charter, which the king delivered to him, and by girding him with a sword; to hold to him and the heirs male of his body by *Elizabeth* his wife, with a pension of 20*l.* a year out of the profits of the county of *Huntingdon*. Vide Id. 264.

§ 84. It also appears from the rolls of parliament, that, in 20 *Rich. 2.*, the chancellor informed the parliament, that the king had created *John de Beauford* Earl of *Somerfet*; whereupon, he was brought before the sovereign, between the Earl of *Huntingdon* and the Earl *Marſhal*, arrayed in a robe, as in a vesture of honour, with a sword carried before him; and the charter of his creation was read before the king and parliament; after which, the king girded him with a sword. Vol.3.p.343.

§ 85. In the rolls of parliament, 21 *Ric. 2.*, there is an account of the creation of several dukes by charter, and investiture. The Countess of *Norfolk* was, at the same time, created a duchess for her life; and, she being absent, her charter was sent to her. Vol.3.p.355.
Vide Bacon's Works, Vol.4. p.637.

§ 86. The usual manner of creating barons, in ancient times, was by writ of summons; but, in the 11th year of *Rich. 2.*, *John Beauchamp de Holt* was created Baron of *Kidderminster* by letters patent: before whom, says Lord *Coke*, there never was any baron created by letters patent, but by writ. And, therefore, whenever a barony appears to have existed before the 11 *Rich. 2.*, it must be taken to be either a barony by tenure, or by writ. 1 Inst. 16b.

§ 87. *Dugdale*

Baron. Vol. 2.
P. 195.

§ 87. *Dugdale* says, that the solemn investiture of barons, created by patent, was performed by the king himself, by putting on a robe of scarlet, as also a mantle and a hood furred with minever. This form of creation continued until 13 *James*, when the lawyers declared, that the delivery of the letters patent was sufficient, without any ceremony.

1 Init. 166.

§ 88. Lord *Coke* observes, that where a person is created a peer by letters patent, the state of inheritance must be limited by apt words, or else the grant is void. The usual words are, to hold to the grantee and the heirs male of his body; though it is sometimes only for the life of the grantee. But Mr. *Selden* says, there was no instance of the grant of a dignity by letters patent to a person, and his heirs generally.

Id. f. 28.

§ 89. The most singular limitation of a dignity which I have seen, is that of the barony of *Lucas* of *Crudwell*: it was granted by letters patent 15 *Cha.* 2. to *Mary* Countess of *Kent*, to hold to her and the heirs male of her body begotten, by the Earl of *Kent*; and, for want of such issue, to the heirs of her body by the said Earl; with a declaration, “that, if at any
“time or times after the death of the said *Mary*
“Countess of *Kent*, and default of issue male of her
“body by the said Earl begotten, there shall be more
“persons than one, who shall be coheirs of her body
“by the said Earl, the said honour, title, and dignity
“shall go, and be held and enjoyed, from time to time,
“by such of the said coheirs, as by course of descent
“at the common law should be inheritable to other
“entire

“entire and indivisible inheritances, as namely, an office of honour and public trust, or a castle for the necessary defence of the realm, or the like; in case any such inheritance was given or limited to the said *Mary*, and the heirs of her body by the said Earl begotten.” And, by a private act of parliament, 15 *Cha.* 2., this declarative clause is ratified and confirmed.

§ 90. In the case of letters patent, the creation of the dignity is perfect and complete; although the grantee should die before he has taken his seat in parliament.

1 Inst. 166.
12 Rep. 71.

§ 91. Thus it appears from the Lords' Journals, that *Henry Waldegrave*, being by letters patent 1 *Jac.* 2. created Baron *Waldegrave de Chenton*, to him and the heirs male of his body, but dying before he sat in parliament, his son *James* was introduced in his robes, and took his seat.

Vol. 21.
P. 682.

The present Lord *Walsingham* took his seat under the same circumstances.

§ 92. It was a common opinion, that a dignity must be created of some particular place, in order that it might appear to be annexed to land, and thereby become a real hereditament. But, in the case of Mr. *Knollys*, who claimed to be Earl of *Banbury*, and was indicted by that title, and a plea put in that it did not appear that *Banbury* was in *England*, Lord *Holt* was of opinion, that the place, from whence a patentee took

A Dignity need not be of any Place.

Dugd. Bar.
V. 3. p. 230.

took his title, need not be in *England*: nor, in reality, was there a necessity that there should be any place. *Albemarle* was not in *England*; and, nevertheless, at the time of *Magna Charta*, there was an earl of that title; and there had been dukes, who had lately borne that title.

Gerard v.
Gerard,
5 Mod. 64.

§ 93. Sir *Thomas Gerard* having been created Lord *Gerard* of *Gerard's Bromley*, by letters patent, (he being then resident with his family in the said capital messuage), a question arose, whether the said capital messuage became thereby *caput baroniæ*; and it was held that it did not.

Dignities by
Marriage,
1 Inst. 16 b.

§ 94. Where a person, who has a dignity, marries, his wife becomes entitled to the same during her life; unless she afterwards marries a commoner. But, where a woman, who has a dignity in her own right, marries a commoner, she still retains her dignity.

1 Inst. 16 b.
a. 6.

§ 95. Lord *Coke* says, if a dutchess by marriage, afterwards marries a baron, she remains a dutchess, and does not lose her name; because her husband is noble. Mr. *Hargrave*, in a note on this passage, observes, that in some books it is said, if a woman, noble by birth, marries one of inferior nobility, she shall be styled by the dignity of her second husband.

At the coronation of his present majesty, the Dutches Dowager of *Leeds*, then the wife of Lord *Portmore*, claimed to walk as a dutchess, but it was refused.

§ 96. It

§ 96. It is said by Justice *Doddridge*, that, if a woman, who acquires a dignity by marriage, elopes from her husband, she will lose her dignity. “ For, as then every woman shall lose her dower, so being advanced to titles of dignity by that husband, by such elopement she loseth them.” I have met with no case that confirms this doctrine.

Coll. 130.

Tit.6.c.5.f.7.

§ 97. It seems to be doubtful, whether a person can refuse or waive a dignity conferred on him by the Crown. Lord *Coke* says, “ if the king calleth any knight or esquire to be a lord of parliament, he cannot refuse to serve the king there *in illo communi concilio*, for the good of his country.” This opinion is contradicted by Lord Chancellor *Cowper*, who held, that the king could not create a subject a peer of the realm, against his will; because then it would be in the power of the king to ruin a subject, whose estate and circumstances might not be sufficient for the honour. His Lordship also held, that a minor might, when of age, waive a peerage granted to him during his infancy.

Whether a Dignity may be refused.

4 Inst. 44.

1 P. Wms. 592.

Lord *Trevor* was of a different opinion, and held, in conformity with Lord *Coke*, that the king had a right to the service of his subjects in any station he thought proper; and instanced in the case of the Crown's having power to compel a subject to be a sheriff, and to fine him for refusing to serve. He observed, that in Lord *Abergavenny's* case it was admitted, the king might fine a person, whom he thought proper to summon to the House of Peers; it being there said, that

Idem.

Ante, f. 51.

a person might choose to submit to a fine : and, if it were allowed, the king might fine one for not accepting the honour, and not appearing upon the writ : the king might fine *toties quoties*, where there was a refusal ; and, consequently, might compel the subject to accept the honour. And that it was not to be presumed the king would grant a peerage to any one, to his wrong, any more than that he would make an ill use of his power of pardoning : all which were supposititious, contrary to the principles upon which the constitution was framed, which depended upon the honour and justice of the Crown.

What Estate
may be had
in a Dignity.

§ 98. With respect to the estate, which may be had in a dignity or title of honour, while dignities were annexed to lands, and held by tenure, the person in possession of the estate, if he was tenant in fee-simple, would, I presume, have had the same estate in the dignity.

1 Inst. 27 a.
Ante, l. 45.

§ 99. A person may also have a qualified fee in a dignity. Thus, Lord *Coke* says, that king *Henry 6.* by letters patent, granted to *John*, the son of *John Talbot*, that he and his heirs, lords of the manor of *Kingston Lisle* in the county of *Berks*, should thenceforth be lords and barons of *Lisle*, and peers of the realm ; by which he held a fee-simple qualified in the dignity, determinable upon his or their ceasing to be lords of the manor of *Kingston Lisle*.

1 Inst. 16 b.

§ 100. As to dignities, derived from writs of summons, Lord *Coke* says,— “ And it is to be observed

“ that, if he be generally called by writ to parliament, he hath a fee-simple in the barony, without any words of inheritance.” But this expression is inaccurate; and Lord *Coke* himself corrected it in the same page, by saying, “ and thereby his blood is ennobled to him and his heirs lineal.” Dignities of this kind, which are descendible to females, have generally been said to be held in fee, but this is a mistake; a person having a dignity of this kind, is not tenant in fee-simple of it: for, in that case, it would descend to the heirs general, lineal, or collateral, of the person last seized; whereas a dignity of this kind is only inheritable by such of his heirs as are lineally descended from the person first summoned to parliament, and not to any other of his heirs. It is, in fact, a species of estate, not known to the law in any other instance, except in that of an office of honour.

Vide Tit. 29.

Tit. 25.

§ 101. A dignity or title of honour may be intailed within the statute *De Donis Conditionalibus*, for it concerns land: and it was resolved by all the judges in 7 *James*, that, where *Ralph Nevil* was by letters patent created Earl of *Westmoreland*, to him and the heirs male of his body, an estate tail was thereby created in the dignity, and not a fee-simple conditional at law. And Lord *Coke* says, the judges observed that, with this resolution, agreed divers precedents, and the experience and practice always used: for the earldom of *Northumberland* was intailed by queen *Mary* to *Thomas Percy*, and the heirs male of his body; and, for default of such issue, that *Hugh* his brother should be earl, to him and the heirs male of his body; and, in that

Nevil's Case,
7 Rep. 33.

that case, by the attainder of *Thomas* for treason, *Hugh* was, after his death, Earl of *Northumberland*.

§ 102. A dignity may not only be intailed at its first creation, but also, a dignity which was originally descendible to heirs general, may be intailed by parliament on the heirs male of the person seized thereof.

Coll. 173.

§ 103. In the year 1626, a contest arose in consequence of the death of *Henry de Vere* Earl of *Oxford*, respecting the right to the earldom, between *Robert de Vere* claiming under an intail of the dignity, made by an act of parliament in 16 *Rich. 2.* as heir male of *Aubrey de Vere*, and Lord *Willoughby of Eresby*, claiming as heir general.

The case was referred by king *Charles* the first to the House of Lords, who called to their assistance Lord Chief Justice *Crew*, Lord Chief Baron *Walter, Doddrige*, and *Yelverton*, Justices, and Baron *Trevor*. Their opinion was delivered by Lord Chief Justice *Crew*; the exordium of which is so eloquent, that, for the gratification of the reader, it shall be transcribed.

“ This great and weighty cause, incomparable to
 “ any other that hath happened at any time, requires
 “ great deliberation, and solid and mature judgment
 “ to determine it: and, therefore, I wish all the judges
 “ of *England* had heard it, (being a case fit for all),
 “ to the end we altogether might have given our
 “ humble

“ humble advice to your Lordships herein. Here is
 “ represented to your Lordships *certamen honoris*, and,
 “ as I may well say, *illustris honoris*, illustrious ho-
 “ nour. I heard a great peer of this realm, and a
 “ learned, say, when he lived, there was no king in
 “ christendom had such a subject as *Oxford*. He came
 “ in with the Conqueror, Earl of *Guynes*; shortly after
 “ the Conquest, made Great Chamberlain of *England*,
 “ above five hundred years ago, by HENRY I. the
 “ Conqueror’s son, brother to *Rufus*; by MAUD the
 “ empress, Earl of *Oxford*; confirmed and approved
 “ by *Henry Fitz-empress*, HENRY II., *Alberico Comiti*,
 “ fo Earl before.

“ This great honour, this high and noble dignity,
 “ hath continued ever since in the remarkable sur-
 “ name of *De Vere*, by so many ages, descents, and
 “ generations, as no other kingdom can produce such
 “ a peer, in one and the self-same name and title.
 “ I find in all this length of time but two attainders
 “ of this noble family; and those in stormy and tem-
 “ pestuous times, when the government was unsettled,
 “ and the kingdom in competition.

“ I have laboured to make a covenant with myself,
 “ that affection may not press upon judgment: for I
 “ suppose, there is no man, that hath any apprehen-
 “ sion of gentry or nobleness, but his affection stands
 “ to the continuance of so noble a name and house,
 “ and would take hold of a twig or twine thread to
 “ uphold it: and yet time hath his revolution; there
 “ must be a period and an end of all temporal things,

“ *finis rerum*, an end of names and dignities, and
 “ whatsoever is *terrene*; and why not of *DE VERE*?

“ For, where is *BOHUN*? Where is *MOWBRAY*?
 “ Where is *MORTIMER*? Nay, which is more and
 “ most of all, where is *PLANTAGENET*? They are
 “ intombed in the urns and sepulchres of mortality.
 “ And yet let the name and dignity of *DE VERE*
 “ stand so long as it pleaseth God.”

Coll. 175.

The Chief Justice and his brethren were of opinion that, although the earldom of *Oxford* was originally held in fee by the family of *De Vere*, yet that “ the honour of the said earldom of *Oxford* was intailed upon *Aubrey de Vere*, and his heirs male, by the parliament of 16 *Rich. 2.*; and that an estate therein to the heirs males was sufficiently raised and created thereby, and so reputed and enjoyed by many descents of the earls, which could not have been, (as the same was limited), if the same had only been an ordinance of parliament; and that the said honour descended, and then of right belonged to *Robert de Vere*, as heir male of the said *Aubrey*, by virtue of the intail.”

§ 104. An estate in a dignity may be limited to a person in remainder, as in the case of the Earl of *Northumberland*; which has already been stated.

1 Inst. 166.
 Seld. Id. c. 9.
 f. 1.

§ 105. Lord *Coke* says, that the king may create either a man or a woman noble for life, but not for years; because then it might go to executors or administrators.

§ 106. While

§ 106. While dignities were annexed to the possession of particular lands, the husband of a woman, having such lands, was bound to perform the services for which they were held, and, among others, to attend the high court of parliament; so that he was entitled to the dignity during the joint lives of himself and his wife.

No Curtesy
of a Dignity.

§ 107. *Elizabeth*, sister and heir of *John de Say* Lord *Say*, (who died in 6 *Rich.* 2.) was twice married: first to Sir *John de Tallefby*, and, secondly, to Sir *William Heron*. She had no issue by either; but each of them was summoned to parliament as long as he remained her husband.

Dugd. Sum.

§ 108. *Monthermer*, who had married the Dowager Countess of *Gloucester*, was summoned to parliament as Earl of *Gloucester* during the minority of her son and heir. When the son came of age, he took his seat in parliament as earl, and *Monthermer* was summoned as a baron.

Vincent upon
Brooke,
Tit. Gloucester,
Coll Arm.

§ 109. Where there was issue, the husband became tenant by the curtesy of the dignity. Thus, Lord *Coke* mentions a case in the reign of *Henry* 6., where a person was allowed to hold the dignity of Earl *Salisbury*, as tenant by the curtesy, in right of *Alicia*, the daughter and heir of the preceding Earl of *Salisbury*.

1 Inst. 29 b.

§ 110. In the reign of *Henry* 8., Mr. *Wimbish* having married a lady entitled to the dignity of *Taylboys*, a question arose, whether he ought to have the name of

Coll. 11.

Lord *Taylboys*, in right of his wife, or not. The king consulted the two chief justices, Dr. *Gardiner* bishop of *Winchester*, and *Garter*. First, the king demanded of the two chief justices, whether, by law, Mr. *Wimbisb* ought to have the name of Lord *Taylboys*, in right of his wife, or not. They answered, that the common law dealeth little with the titles and customs of chivalry; but such questions had always been decided before the constables and marshals of *England*. Then the king moved the questions to Dr. *Gardiner*, who answered, that, by the law which he professed, dignity was denied both to women and to jews. I like not that law, quoth the king, that putteth christian women and jews in the same predicament. That law, said Dr. *Gardiner*, as I take it, is to be intended of dignity, whereunto public office is annexed: for, in *France*, women succeed as well to their ancestors in dignities, as in patrimonies: therefore the custom of every region is to rule those things. Then the king asked *Garter*, of the custom of *England*; who answered, that it had been always used so in *England*, as in *France*, that the husband of a baroness by birth should use the style of her barony, so long as she lived; and, if he were tenant by the curtesy, then that he might use it for term of his life. The chief justice confessed that custom, concerning the tenant by the curtesy, to be consonant to the common law: for the common law admitted him to all his wife's inheritances, of which she was seised during the coverture; and that might descend to their issue; and the dignity was parcel of the inheritance: which Dr. *Gardiner* confessed, adding, that the law granting the more, which was the possession

possession of the barony, could not be intended to deny the less, which was the dignity, a thing incident to it. As it standeth with law, said the king, that tenants by curtesy should have the dignity, so it standeth with reason. But I like not that a man should be this day a lord, and to-morrow none, without crime committed; and it must so fall out in the husband of a baroness, if she die, having never had by him any children. The chief justice confirmed, that, in that point, the common law dissented not much from the king's reason: for the husband, that never had issue, was thought to have no interest in law in his wife's inheritance, more than in respect only that he was a husband; but, having a child, then he acquired a state in law, and was admitted to do homage, and not before.

The king for resolution said, that forasmuch as by their speeches he understood, that there was no force of reason or law to give the name to him that had no issue by his wife, that neither Mr. *Wimbish*, nor none other, from thenceforth, should use the style of his wife's dignity, but such as by curtesy of *England* had also right to her possessions for term of his life. The which opinions the persons afore named applauded, and so the sentence stood.

§ 111. Notwithstanding this recognition of the Coll. 23. doctrine of curtesy in dignities, the claim of *Richard Bertie*, in 1580, to the barony of *Willoughby* in right of his wife, *Catharine*, dutchess of *Suffolk*, as tenant by the courtesy, was rejected; and *Peregrine Bertie* her son was admitted, in the life time of his father.

1 Inst. 29 b.
n. 1.

§ 112. Mr. *Hargrave* has observed, that two other claims of a like kind were made in a few years after, but were not determined; and he could not learn that there had been any claims of dignities by curtesy, since Lord *Coke's* time: and, from the want of modern instances of such claims, as well as from some late creations, by which women were made peereffes, in order that the families of their husbands might have titles, and yet the husbands themselves remain commoners, it seemed as if the prevailing notion was against curtesy in titles of honor. However, he had not yet discovered, whether this great question had ever formally received the judgment of the House of Lords.

§ 113. It may also be observed, that there are some modern instances of persons, sitting in parliament, as heirs to their mothers' dignities, in the lifetime of their fathers; which would not have been allowed, if their fathers had an estate by the curtesy in those dignities. Thus, the present Duke of *Northumberland* was allowed to sit in parliament as Baron *Percy*, immediately after the death of his mother, though his father was living.

In the same manner, the present Earl of *Leicester* was allowed to take his seat in parliament, as baron *de Ferrers*, upon the death of his mother, though his father, Lord *Townsend*, was alive.

A Dignity
cannot be
aliened.

Coll. 114.
116.

§ 114. Formerly, it was held that a dignity or title of honour, held by tenure, might be aliened by the person who was in possession of it; provided such alienation was made with the king's licence.

§ 115. *Hereward*

§ 115. *Hereward De Marisco* and *Rametta* his wife, conveyed to *Simon De Montfort* Earl of *Leicester*, *totam baroniam De Emeldon, in Com. Northumbr. quæ ad ipsam Ramettam jure hereditario descendit de hereditate quæ fuit Johannis le Viscount patris sui, habend. & tenend. eidem com. et hæredibus suis et eorum assignatis.* Pat. An. 5 Ed. 3. p. 2. m. 4.
And king *Hen. 3.* confirmed the grant anno 41, which with others was afterwards confirmed by king *Edward 3.*

§ 116. Lord *Coke* says, that the barony of *Edmond de Eincourt*, originally created by writ*, had long continued in his surname; and he having no issue male, desirous that his surname, arms, and barony, all which he held in fee-simple, might continue, by humble suit importuned king *Edward 2.* for that he conceived, *quòd cognomen suum, et arma, post mortem suam dele-rentur, et corditer affectabat ut post mortem ejus in memoria haberentur, ut de maneriis et armis suis feoffaret quemcunque voluerit;* and in the end obtained his suit, by the king's letters patent under the great seal; and afterwards, about 19 *Edw. 2.*, he assigned according to the king's grant, his surname, arms, and possessions. For, it appears in the close rolls, that *Edmond* Baron of *Eincourt*, sat in parliament until and in 18 *Edw. 2.*; and that after his decease, his assignee sat in parliament in 1 *Edw. 3.* by the name of *William de Eincourt*: and in his heirs males the dignity, surname, and possessions continued till 21 *Hen. 6.*; 4 Inst. 126.

* It appears from *Dugdale's Baron.* vol. 1. p. 385., that this was a barony by tenure: for he does not mention any writ.

and then his heir male, together with the name and dignity, ceased.

4 Inst. 126.

§ 117. Lord *Coke* also says, he heard lord *Burgley* vouch a record in the reign of *Edw. 4.* that the Lord *Hoe*, having no issue male, by his deed and under his seal, granted his name, arms, and dignity over; but not having the king's licence and warrant, the same was in parliament adjudged to be void.

Lords' Jour.
vol. 4. p. 150.

§ 118. It has, however, been long established, that a dignity or title of honour is unalienable; being an hereditament inherent in the blood of the grantee, and his descendants: and, in the case of the barony of *Grey of Ruthyn*, in 1640, the House of Lords made the following resolution:—"Upon somewhat which
" was spoken of in the argument concerning a power
" of conveying away of honour, it was resolved upon
" the question, *nemine contradicente*, that no person,
" that hath any honour in him, and a peer of this
" realm, may alien or transfer the honour to any other
" person."

Nor surrendered to the King.

§ 119. It was also formerly held, that a dignity or title of honour might be surrendered to the king; of which there are several instances.

Coll. 10,

§ 120. Sir *Charles Brandon*, being affianced to *Elizabeth* Viscountess *Lisle*, (who was then an infant of tender age), obtained letters patent creating him Viscount *Lisle*, to him and his heirs by the said *Elizabeth*. "But, having shortly after happened on
" a fatter

“ a fatter morfel, he yielded up the letters patent to
“ be cancelled.”

§ 121. It was, however, refolved by the Houfe of Lords, in the cafe of the barony of *Ruthyn*,—“ That
“ no peer of this realm can drown or extinguish his
“ honour, (but that it defcends to his descendants),
“ neither by furrender, grant, fine, nor any other
“ conveyance, to the king.”

Lords' Jour.
vol. 4. 150.

§ 122. Some years afterwards the queftion arofe, and was agitated in the Houfe of Lords; where it was decided in conformity to the refolution in the above cafe.

Lord viscount *Purbeck* had furrendered his dignity to the king, by fine; and after his deceafe, the dignity was claimed by his heir.

Shower's
Cafes in Parl.
1.

It was argued on behalf of the petitioner, that this was a perfonal dignity, annexed to the blood, and fo infeparable and immovable, that it could not be either transferred to any other perfon, or furrendered to the crown. It could neither move forward nor backward, but only downward to pofterity; and nothing but deficiency, or a corruption of the blood, could hinder the defcent.

The king's attorney-general, (Sir *William Jones*), endeavoured to fupport the furrender upon the authority of feveral ancient precedents. The Houfe of Lords came to the following refolution:—“ Forasmuch as
“ upon debate of the petitioner's cafe, who claims the

Lords' Jour.
vol. 13. p. 253.

“ title

“ title of Viscount *Purbeck*, a question in law did
 “ arise; whether a fine, levied to the king by a peer
 “ of the realm of his title of honour, can bar and
 “ extinguish that title; the lords spiritual and tem-
 “ poral in parliament assembled, upon very long
 “ debate; and having heard his majesty’s attorney-
 “ general, are unanimously of opinion, and do resolve,
 “ that no fine, now levied or at any time hereafter to
 “ be levied to the king, can bar such title of honour,
 “ or the right of any person, claiming under him
 “ that levied, or shall levy, such fine.”

A Peer de-
 graded for
 Poverty.

§ 123. There is one instance of a peer being de-
 graded for poverty.

Rot. Parl.
 vol. 6. 173.
 4 Inst. 355.
 12 Rep. 107.

By an act of parliament made in 17 *Edw. 4.*, recit-
 ing that the king had erected and made *George Nevill*
 Duke of *Bedford*, and had purposed to have given him
 for the sustentation of the same dignity sufficient live-
 lihood; and, for the great offences, unkindness, and
 misbehavings that the said *John Nevill*, (his father),
 had done and committed to his highness, as was
 openly known, he had no cause to depart any liveli-
 hood to the said *George*. And that it was openly
 known, that the said *George Nevill* had not, nor by
 inheritance might have, any livelihood to support the
 name, estate, and dignity of Duke of *Bedford*; as
 oftentimes it was seen that when any lord was called
 to high estate, and had not livelihood convenient to
 support the same dignity, it induced great poverty and
 indigence, and oftentimes caused great extortion, em-
 bracery, and maintenance to be had, to the great
 trouble

trouble of all such countries, where such estate should happen to be inhabited: wherefore the king, by the advice of the lords spiritual, &c., ordained, that from thenceforth the said erection and making of the same duke, and all the names of dignity to the said *George*, or to *John Nevill* his father, should be from thenceforth void and of none effect.

§ 124. Sir *William Blackstone* has observed, that this is a singular instance; which serves at the same time, by having happened, to shew the power of parliament; and, by having happened but once, to shew how tender the parliament hath been in exerting so high a power. It hath been said, indeed, that if a baron wastes his estate so that he is not able to support the degree, the king may *degrade* him. But it is expressly held by later authorities, that a peer cannot be degraded, but by act of parliament. 1 Comra. 402.
12 Mod. 56,

§ 125. It appears formerly to have been doubted, whether a barony by writ was not extinguished by the acceptance of a new barony of the same name. But it is now settled, that the acceptance of a new dignity doth not merge or destroy an ancient one. A Dignity not extinguished by a new Title,

§ 126. In the case of lord *Delawarre*, it was resolved in parliament 39 *Eliz.*; that a grant of a new barony of *Delawarre* to *William West*, who was not then in possession of the old barony of *Delawarre*, did not merge or extinguish the old barony. 11 Rep. 1.
Coll. 122,
123.

§ 127. And

Coll. 321.

§ 127. And in the case of the barony of lord *Willoughby de Broke*, it was resolved by the House of Lords, that the grant of a new barony of *Willoughby de Broke* to Sir *Foulk Greville*, by letters patent to him and his heirs male, (he being in possession of the ancient barony by writ), did not destroy such ancient barony. But the same continued and descended to his sister, and sole heir, and from her to Sir *Richard Verney*; who was seated in the House of Lords according to the date of the ancient barony.

Infra.

An Earldom
does not
attract a
Barony.

§ 128. It was also formerly held, that, where a person, having a barony created by writ, and consequently descendible to his heir general, was created an Earl to him and the heirs male of his body; the earldom attracted the barony, so that it could not be afterwards separated from it.

Coll. 195.
1 Inst. 15 b.
n. 3.

§ 129. This doctrine, however, was fully exploded in the case of the barony of *Grey of Ruthyn*; in which it appeared, that Lord *Grey*, being a baron by writ, was created Earl of *Kent* by letters patent to him and the heirs male of his body, and had issue two sons, the eldest of whom had issue a daughter only. And it was resolved, that the barony descended to the daughter, and the earldom to the younger brother; and that the earldom did not attract the barony.

Lords' Jour.
vol. 4. 149.

§ 130. So, where the earldom becomes extinct, the barony will, notwithstanding, descend to the heir general.

§ 131. In the year 1669, the claim of *Benjamin Mildmay* to the barony of *Fitzwalter* was heard before the King in Council, assisted by the two Chief Justices, the Lord Chief Baron *Hale*, the King's Chief Serjeant, and the Attorney and Solicitor-General. The petitioner deduced his pedigree from *Robert Fitzwalter*, who was summoned to parliament by writ, in 23 *Edw. 1.* and several times after. The title descended to *Robert Fitzwalter*, who was created Viscount *Fitzwalter* and Earl of *Suffex*, by *Hen. 8.* This Earl of *Suffex* had two sons, *Henry* Earl of *Suffex*, and Sir *Humphrey Ratcliff*. *Henry* had two sons, *Thomas* Earl of *Suffex*, who died without issue, and *Henry* Earl of *Suffex*, who left one son, *Robert* Earl of *Suffex*, and one daughter, Lady *Frances*, who married Sir *Thomas Mildmay*, to whom the petitioner was heir.

The counsel on the other side insisted, that the barony was merged and extinct in the earldom, by coming to *Edward* the last Earl of *Suffex*; who died without issue.

The question being put to the Judges, they unanimously agreed, that, "if a Baron in fee simple be made an Earl, the barony will descend to the heir general, whether the earldom continue or be extinct;" with which opinion and resolution his Majesty being fully satisfied in council, it was ordered by his Majesty in council, that the petitioner be admitted humbly to address himself to his Majesty, for his writ, to sit in the House of Peers, as Baron *Fitzwalter*.

A writ of summons was accordingly issued to him ; and he was seated in the place of the ancient barons of *Fitzwalter*.

A Dignity is
forfeited by
Attainder.

§ 132. A dignity or title of honour, whether held in fee, in tail, or for life, is forfeited, and for ever lost, by the attainder for treason or felony of the person possessed of it ; and can never be again revived, but by reversal of the attainder.

Nevill's Case.
7 Rep. 33.

§ 133. *Charles Nevill*, Earl of *Westmoreland*, to him and the heirs male of his body, by letters patent, was attainted of high treason, by outlawry, and by act of parliament ; and died without issue male ; upon which *Edward Nevill* claimed to be Earl of *Westmoreland*, as heir male of the body of the first grantee of the earldom.

It was resolved by all the judges, that, although the dignity was within the statute *de donis conditionalibus*, yet it was forfeited by a condition in law, *tacite* annexed to the estate of the dignity ; for an earl has an office of trust and of confidence : and, when such a person, against the duty and end of his dignity, takes not only council, but also arms against the King, to destroy him, and thereof is attainted, by due course of law ; by that he hath forfeited his dignity, in the same manner, as if tenant in tail of an office of trust misuse it, or use it not ; these are forfeitures of such office, for ever, by force of a condition in law *tacite* annexed to their estates. It was also resolved that, if it had not been forfeited by the common law, it would have been forfeited by the 26 *Henry* 8.

Tit. 25. f.

Tit. 2. c. 2.
f. 30.

§ 134. In

§ 134. In the case of a dignity descendible to heirs general, the attainder of any ancestor of a person claiming such dignity, through whom the claimant must derive his title, (though the person attainted was never possessed of the dignity), will bar such claim: for, the blood of the person attainted being corrupted, no title can come through him.

Corruption of Blood.

§ 135. *William Marquis of Tullibardine*, the eldest son of *John* first Duke of *Athol*, was attainted by act of parliament, 1 *Geo.* 1. and fled into *France*. An act of parliament was passed in the same sessions, by which it was enacted, that the attainder of the Marquis of *Tullibardine* should not extend to prevent any descent of honour or estate from the Duke of *Athol* to *James Lord Murray* his second son; but that all the honours, titles, and estate of the said Duke of *Athol* should, from and after his death, descend to the said *James Murray* and his issue, in such manner as the same would have descended, in case the said Marquis of *Tullibardine* had not been attainted of high treason, and had died without issue in the lifetime of the said Duke of *Athol*.

§ 136. In the year 1723, *Robert Lumley Lloyd*, Coll. 373. rector of *St. Paul's, Covent Garden*, claimed the barony of *Lumley*, which was created by writ of summons in 8 *Rich.* 2., as heir to *Ralph Lord Lumley*, the first person summoned to parliament. It appeared, that *George Lumley*, the eldest son of *John Lord Lumley*, was attainted of treason in the lifetime of his father;

and died before his father, leaving issue from whom the claimant was descended.

The House of Lords resolved, that the petitioner had not any right to a summons to parliament, as prayed by his petition *.

Exception.
attainted Dig-
nities.

Law of For-
feiture,
Hale, P. C.
56.

Ante f. 136.

§ 137. In the case of intailed titles, no corruption of blood takes place. And, therefore, a dignity in tail may be claimed by a son, surviving an attainted father, who never was tenant in tail in possession of such dignity: for the son may claim from the first purchaser of the dignity *per formam doni*, as heir male of his body within the description of the grant. And, though the descent of a dignity, to which the heirs general of the first grantee are inheritable, may be impeded by corruption of blood, as in the case of the barony of *Lumley*, yet the attainder of a father, who was never possessed of an intailed dignity, will not prejudice the descent to his issue.

Lords' Jour.
vol. 30. p.
66. 469.

§ 138. In 1764, *John Murray*, presented a petition to his Majesty, stating that his grandfather *John*, Marquis of *Athol*, was by letters patent created Duke of *Athol*; to hold to him and the heirs male of his body. That the said Duke of *Athol* died in 1725; leaving *James* his eldest son, who succeeded to the title, and *George* his next son, the petitioner's father.

* The doctrine of corruption of blood was abolished in the reign of Queen *Ann*, but has been revived by the statute 39 *Geo.* 3. c. 93.

That the said *George* was, in 1745, attainted of high treason by act of parliament, and died in 1760; leaving the petitioner his eldest son. That *James Duke of Athol*, the petitioner's uncle, died in January 1764, without leaving any issue male.

That the petitioner had consulted many gentlemen, learned in the law of *England*, particularly the honourable *Charles Torke*, *Sir Fletcher Norton*, and *Mr. De Grey*; whether the said attainder, under the circumstances of the case, could be any bar to the petitioner's succeeding to the said title, upon the death of his said uncle *James Duke of Athol*: and the said gentlemen were unanimously of opinion, that as, by the law of *England*, in a like case no objection could arise from the said attainder; and as, by the statute of 7 *Ann.*, all persons attainted of treason in *Scotland* were liable to the same corruption of blood, pains, penalties and forfeitures, as persons convicted or attainted of high treason in *England*, the petitioner would be clearly entitled to succeed to the said honours. The petition, therefore, prayed that proper directions should be given, for having the petitioner's right declared and established.

The petition was referred to the House of Lords, who resolved, that the petitioner had a right to the title of *Duke of Athol*: and a writ of summons was issued to him accordingly.

§ 139. In all cases, where a person has been attainted of high treason by act of parliament, or by

VOL. III. R judgment

Restitution of Blood.

1 Hale, P. C. judgment on an indictment for high treason, petty treason, or felony, his blood is corrupted, and can only be restored by act of parliament; which may be either general or special. But, generally, says Lord Hale, a restitution in blood is construed liberally and extensively.

Ante, f. 136.
Collins, 374.

§ 140. In the case of the barony of *Lumley*, the petitioner's counsel produced an act of parliament 6 *Edw. 6.*, upon the petition of *John Lumley*, eldest son of *George Lumley*, son and heir apparent of *John* late Lord *Lumley* deceased; whereby, after a recital of the attainder of the said *George Lumley*, by reason whereof the said *John Lumley* stood, and was a person in his lineage and blood corrupted, and deprived of all degree, estate, name, fame, and of all other inheritance, that should or might by possibility have come to him by any other his collateral ancestors, on his said father's side, to whom he should or might have conveyed himself, as cousin and next heir of blood, by mesne degrees by his said father: it was therefore enacted, that the said *John Lumley*, and the heirs males of his body coming, might and should be accepted and called from thenceforth by the name of Lord *Lumley*; and that he, and the heirs males of his body, should have and enjoy in and at all parliaments, and all other places, the room, name, place, and voice, of a baron of this realm. And that the said *John Lumley*, and his heirs, might be and should be restored only in blood, as son and heir, and heirs to the said *George Lumley*, and as cousin and heir and heirs of the said *John*

John late Lord *Lumley*, and made only heir and heirs in blood, as well as to the said *George* as to the said *John* late Lord *Lumley*, and either of them, by the name of Lord *Lumley*.

It was contended, that the attainder of *George Lumley* was not reversed by this act, but remained in force ; and that the restitution of the said *John* Lord *Lumley*, in blood only, while the attainder remained unreversed, could not possibly revive the antient barony, which was before extinct, and merged in the crown, in consequence of that attainder. The House of Lords appear to have been of this opinion, and to have determined accordingly.

§ 141. Where a person is outlawed for high treason, petty treason, or felony, his blood is also corrupted ; but it may be restored by act of parliament, or by a reversal of the judgment of outlawry, by writ of error : which may be done during the life of the person outlawed, or at any time after. But a writ of error, to reverse an outlawry in treason or felony, is not *ex debito justitiæ* ; and, therefore, can only be obtained by the favour of the crown.

§ 142. The House of Lords resolved in 1702, that they would not, in future, receive any bill for reversing outlawries, or restitution in blood, that should not be first signed by her majesty, or her successors, kings or queens of the realm, and sent by her or them to their house first, to be considered there.

Lord's Jour.
Vol. 17.
p. 119.

Descent of
Dignities.

§ 143. Dignities are hereditary; and it has already been stated, that, where a dignity is by tenure, it will descend in the same manner as an estate in fee-simple in lands. But, where a dignity was originally created by writ of summons to parliament, it is descendible to all the lineal heirs of the person so summoned, whether male or female; but not to collaterals.

§ 144. The right of primogeniture takes place between males in the descent of dignities; and, therefore, where a person possessing a dignity, dies, leaving several sons, it descends upon the eldest: for, being of an indivisible nature, it cannot go to them all.

§ 145. The descent of dignities by writ is, in some respects, different from the descent of lands; possession does not affect the descent of a dignity: for every person, claiming a dignity by writ, must make himself heir to the person first summoned, not to the person last seised. And, for this reason, a brother of the half-blood is capable of inheriting a dignity: for the younger brother, being heir to the father, shall inherit the dignity inherent in the blood, as heir to him that was first created noble.

Lord Grey's
Case,
Cro. Car. 601.
1001. 195.

§ 146. A question was moved in parliament in 16 Cha. 1., respecting the barony of *Grey de Ruthyn*; which was originally created by writ of summons. Lord Grey died, leaving a son and a daughter by one venter, and a second son by another venter. The barony descended to the eldest son, who sat in parliament, and afterwards died without issue. The question

was,

was, whether the second son should inherit the barony, or the sister; and the opinion of the judges was required; who resolved, that there was not any *possessio fratris* of a dignity, but it should go to the younger son, who was *heres natus*; and the sister was only *heres facta*, by the possession of her brother, of such things as were in demesne, but not of dignities, whereof there could not be an acquisition of the possession.

Lords' Journ.
V. 4. 149.
8 Term Rep.
213.

§ 147. Lord *Hale*, in his notes to the *First Institute* published by Mr. *Hargrave*, observes on this case, that, if it was a feudal title of honour, as of the earldom of *Arundel*, or barony of *Berkley*, there *possessio fratris* should hold well; because the title is annexed to the land.

1 Inst. 15 b.
n. 3.

§ 148. In the case of dignities created by letters patent, the mode of descent is precisely declared. The usual one is, to the heirs male of the body of the grantee; though, in some, it is to the heirs of the body generally.

§ 149. In antient times, the right of primogeniture appears to have taken place in the descent of dignities to females, as well as to males; so that, where a person died seised of a dignity, leaving any daughters, or sisters, the dignity descended to the eldest; or, at least, the eldest had a stronger claim than the others.

Abeyance of
Dignities.

§ 150. Thus, *Dugdale* mentions, that *Edward 3.* by letters patent, declared *Lawrence Hastings* to be Earl of *Pembroke*, by reason of his descent from the eldest

sister and coheir of *Aymer de Valence*, who died seised of that dignity.

4 Inst. Ch. 40.

These letters patent are stated by Lord Coke in his *Fourth Institute*; and, as they recognize the right of the eldest sister in the strongest terms, I shall here transcribe a part of them.—*Cum itaque hæreditas bonæ memoriæ Audomari de Valentiâ Comitis Pembrochiæ (ut dicitur) jampridem sine hærede de corpore suo procreato decedentis ad sorores suas fuerit devoluta, inter ipsas et earum hæredes proportionabiliter dividenda: quia constat nobis quòd præfatus Laurentius, qui dictus Audomar³ in partem hæreditatis succedit, est ex ipsius Audomari sorore seniori descendens, et sic peritorum assertione, quos super hoc consulimus, sibi debeatur prærogativa nominis; et honoris justum et debitum reputamus, ut idem Laurentius ex seniori sorore causam habens, assumat, et habeat nomen Comitis Pembrochiæ, quod dictus Audomarus habuit dum vivebät: quod quidem (quantum in nobis est) sibi confirmamus, ratificamus, et etiam approbamus; volentes et concedentes ut dictus Laurentius prærogativam et honorem Comitis Palatini in terris quas tenet de hæreditate dicti Audomari, adeo pleno et eodem modo habeat, et teneat, sicut idem Audomarus illas habuit et tenuit tempore quo decessit.*

1 Inst. 165 a.
Fitz Ab.
Tit. Præscrip.
18.

§ 151. Lord Coke, in his *First Institute*, had stated a case in 23 Hen. 3. in these words:—“ Note, if the
“ earldom of *Chester* descend to coparceners, it shall
“ be divided between them, as well as other lands;
“ and the eldest shall not have this seignory and earl-
“ dom entire to herself, *quod nota*, adjudged *per totam*
“ *curiam* :”

“ *curiam :*” and his Lordship makes the following observations on this case. “ By this, it appeareth, that “ the earldom, (that is, the possessions of the earldom,) “ shall be divided ; and that, where there be more “ daughters than one, the eldest shall not have the “ dignity and power of the earl, that is, to be a “ countess. What, then, shall become of the dignity ? “ The answer is, that, in that case, the king, who is “ sovereign of honour and dignity, may, for the “ uncertainty, confer the dignity upon which of the “ daughters he please ; and this hath been the usage, “ since the Conquest, as it is said.”

§ 152. The case respecting the earldom of *Chester* is probably mis-stated : for it appears from *Dugdale*, that *Ranulph* Earl of *Chester* died in 16 *Hen.* 3. without issue, leaving four sisters ; of whom *Maud*, the eldest, was married to *David* Earl of *Huntingdon*, brother to *William* king of *Scotland*, by whom she had a son *John*, surnamed *Scot* ; who succeeded *Ranulph* in the earldom of *Chester*. But the reason of this case was, that, in the partition of the vast possessions of *Ranulph*, this *John* had for his part (his mother being dead) the whole county of *Chester*.

Baron. Vol. 1.
44, 45.

§ 153. *Bracton* treats of the partition of estates among parceners ; and observes that, where a mansion-house was *caput comitatús* or *baroniæ*, it was not divisible, *propter jus gladii, quod dividi non potest* ; for, by that means, earldoms and baronies would come to nothing. *Per quod deficiat regnum, quod ex comitatibus et baroniis dicitur esse constitutum.*

76 a. & b.

Now, as the eldest daughter had a right to the principal mansion, if it was a *caput comitatûs*, or *baroniæ*, she would, in those times, have been entitled to the dignity annexed to it: and this appears to have been the reason, that the whole earldom of *Chester* was allotted to the son of the eldest sister, who, by that means, acquired the dignity.

Dugd. Bar.
vol. 2. 245.

§ 154. It appears that, so late as in the reign of *Hen. 6.*, the eldest daughter was supposed to have a claim to her father's dignity, superior to that of her sisters. But, whatever might have been the old law on this subject, the doctrine laid down by Lord *Coke* was fully established in his time: and it was soon after determined by the Judges, and the House of Lords, that where a dignity or title of honour is descendible to heirs general, and the person possessed of it dies, leaving only daughters, or sisters, or coheirs, it falls into abeyance; or rather, becomes vested in the crown during the continuance of the coheirship.

Collins, 175.
Lords' Jour.
vol. 3. 535.

§ 155. Thus in the case of the earldom of *Oxford* and Great Chamberlain, a report was made to the House of Lords by Lord Chief Justice *Crewe*; that he, with the Lord Chief Baron *Hale*, Mr. Justice *Doderidge*, Mr. Justice *Yelverton*, and Mr. Baron *Trevor*, had, according to the order of the House, considered the titles of the competitors to the earldom of *Oxford*, the baronies of *Bulbeck*, *Sanford*, and *Badlesmere*, and the office of Great Chamberlain of *England*. And they certified that, "as touching the baronies of *Bulbeck*, "*Sanford*, and *Badlesmere*, their opinion was, that
" the

“ the same descended to the general heirs of *John*,
 “ the fourth Earl of *Oxford*, who had issue *John* the
 “ fifth Earl of *Oxford* and three daughters, one of
 “ them married to the Lord *Latimer*, another to *Wing-*
 “ *field*, and another to *Knightley*; which *John* the fifth
 “ Earl of *Oxford* dying without issue male, those
 “ baronies descended upon the daughters as his sisters
 “ and heirs. But, these dignities being entire and not
 “ dividable, they became incapable of the same,
 “ otherwise than by gift from the crown; and they,
 “ in strictness of law, reverted to, and were in the
 “ disposition of king *Henry 8.*”

In this case, the House of Lords certified to the king, that, for the baronies, they were wholly in his majesty's hand, to dispose of at his own pleasure.

§ 156. The expression, that baronies in abeyance are wholly at the disposal of the Crown, is too general; for it is not in the power of the Crown to dispose of such baronies to a mere stranger. But the Crown has the prerogative of terminating the abeyance, or suspension of the dignity, by nominating any one of the coheirs to it: and such a nomination operates, not as a new creation of a dignity, but as a revival of the antient dignity: for, the nominee becomes entitled to precedence, according to the date of the antient dignity, to which he is nominated.

The King
may termi-
nate the
Abeyance.

§ 157. Sir *William Blackstone* observes, that in the king's prerogative, of conferring a dignity on which of the daughters he pleases, is preserved a strong trace
of

2Comm. 216.

1 Lib. Feud.
1.

of the antient law of feuds, before their descent by primogeniture, even amongst the males, was established: namely, that the lord might bestow them on which of the sons he thought proper. *Progreffum est ut ad filios deveniret, in quem scilicet dominus hoc vellet beneficium confirmare.*

Lords' Journ.
Vol. 30. 403.

§ 158. There are several instances, where the Crown has exercised this power. In 1763, his Majesty issued his writ of summons to Sir *Francis Dashwood* Baronet, by the title of Lord *Le Despencer*; the Lord Chancellor informing the House of Lords, that he was one of the heirs of Lady *Mary Fane*, in favour of whom and whose heirs king *James 1.* had revived the ancient barony of *Le Despencer*; and, thereupon, he was allowed to take his place upon the upper part of the Bench, next above Lord *Abergavenny*.

Lords' Journ.
Vol. 2. 347.

§ 159. In the year 1764, *Norman Berkley Esq.* petitioned his Majesty to be nominated to the antient barony of *Botetourt*; stating, that *John de Botetourt* Chevalier, was summoned to parliament as a baron, by writ in 33 *Edw. 1.*, and sat in parliament in pursuance of that writ. That the said *John* had issue a son *John*, (who died in the lifetime of his father, leaving issue a daughter *Joyce*), and five daughters. That the said *Joyce* died without issue of her body in 7 *Hen. 4.*; and that, thereupon, the barony became in abeyance amongst the daughters of the said *John* last Lord *De Botetourt*. That the petitioner was sole heir of *Catharine Berkley*, one of the said daughters of *John* Lord *Botetourt*. This petition having been referred to the House

House of Lords, the committee of privileges reported, that the barony of *Botetourt* was in abeyance ; and that the petitioner was one of the coheirs of *John Lord Botetourt*. Soon after, his Majesty ordered a writ of summons to be directed to *Norman de Botetourt* Chevalier ; who, in consequence thereof, was allowed to take place on the Barons' Bench, next after Lord *Dacre*.

Lords' Journ.
Vol. 30. 561.

Id. 572.

§ 160. The barony of *Willoughby of Eresby* fell into abeyance in the year 1779, by the death of *Robert Bertie* Duke of *Ancafter* and *Kesteven*, without issue, leaving Lady *Priscilla*, *Barbara*, *Elizabeth*, and Lady *Georgina Charlotte Bertie*, his sisters and coheirs. And, in the following year, his Majesty, by letters patent, confirmed the barony of *Willoughby of Eresby* to Lady *Priscilla Barbara Elizabeth*, then the wife of *Peter Burrell* Esq., since created Lord *Gwydir*, and the heirs of her body.

§ 161. In the case of Sir *John Griffin Griffin*, in 1784, claiming to be one of the two coheirs of *James Lord Howard of Walden*, grandson and heir of *Thomas Lord Howard of Walden*, who was summoned to parliament by writ in 40 *Eliz.*, and sat therein ; the Attorney General reported, “ that the said Sir *John Griffin* “ *Griffin* had, in his opinion, proved his pedigree ; “ and that the Earl of *Bristol* and the petitioner appeared to him to be the coheirs of the body of “ *Thomas Lord Howard of Walden* ; and that, if the “ said *Thomas Lord Howard of Walden* was called up “ to the House of Peers by writ, without patent, and “ sat

“ fat by virtue of the fame, (which, as far as he could
 “ collect from the evidence laid before him, appeared
 “ to be the case), he acquired thereby an inheritance
 “ in the barony, to him and the heirs of his body ;
 “ and that the fame was then in abeyance, between
 “ the petitioner and the Earl of *Bristol* ; in which case,
 “ his Majesty had an undoubted right to allow and
 “ confirm the fame barony, either to the petitioner,
 “ or to the said Earl of *Bristol* : and such person, to
 “ whom the fame was so confirmed, and the heirs of
 “ his body, would hold and enjoy the said barony,
 “ and all the privileges thereunto belonging, exclu-
 “ sively of the other and the heirs of his body, whose
 “ right to the fame would remain dormant and sus-
 “ pended, so long as there should be issue of the body
 “ of the person to whom the fame should be so
 “ confirmed.”

The House of Lords resolved, that the barony of
Howard of Walden was in abeyance ; and that the peti-
 tioner was one of the coheirs of *James* the then last
 Lord *Howard of Walden* : and Sir *John Griffin Griffin*
 was summoned to parliament by writ, as Lord *Howard*
 of *Walden*.

§ 162. Where the king terminates the abeyance of
 a dignity in favour of a commoner, he issues a sum-
 mons to him by the name of the barony, which was in
 abeyance ; as, in the cases of Lord *Le Despencer* and
 Lord *Botetourt*. But, where the person, in whose fa-
 vour the abeyance is terminated, is already a peer,
 and has a higher dignity, there, the king makes a
 declaration

declaration under the Great Seal, confirming the barony to him : and, in the case of a female, the abeyance is also terminated by a declaration. Formerly, it was the practice, to confirm the barony to the person, and his or her heirs ; but now it is only to the heirs of his or her body.

§ 163. Where an abeyance is terminated by a writ of fummons, different opinions have been entertained respecting the extent of the operation of such a writ. Some eminent persons are said to have held, that, where a barony is in abeyance between the descendants of two coheirs, and the king issues his writ of fummons to one of the heirs of the body of one of the two coheirs, the abeyance is thereby terminated ; not only as to the person summoned, and the heirs of his or her body, but also as to all the heirs of the body of such original coheir ; but the better opinion seems to be, that the effect of a writ of fummons, in a case of this kind, is only to terminate the abeyance as to the person summoned, and the heirs of his or her body ; and that, upon failure of heirs of the body of the person so summoned, the barony will again fall into abeyance, between the remaining heirs of the body of the original co-heir, one of whose heirs was so summoned, if any, and the heirs of the body of the other co-heir.

Effect of a Writ of Summons to one of the Heirs of a Co-heir.

Vide Case of Lord Howard of Walden, ante, f. 161. and Lord Ch. Justice Eyre's Argument in the Case of the Barony of Beaumont. *Infra.*

§ 164. This latter opinion is founded upon a principle of law, that possession does not affect the descent of a dignity ; and that a writ of fummons to parliament by an ancient title, (as the fummons of the eldest

Ante, f.

eldest son of a peer in the lifetime of his father, by the name of an ancient barony then vested in the father), will not operate, so as to give any title by descent, collateral or lineal, different from the course of descent of the ancient barony; as was determined in the case of the barony of *Sydney* of *Penshurst*. And that he who claims a dignity must make himself heir to the person on whom the dignity was originally conferred; not to the person who last enjoyed it.

Where only
one Heir, the
Abeyance ter-
minates.

Skin. R. 437.

§ 165. In all cases of abeyance of dignities, whenever the co-heirship determines by the death of all the sisters but one, or by the extinction of all the descendants of such sisters but one, by which there remains only one heir to the dignity, the abeyance is terminated; and the person, who is sole heir, becomes immediately entitled to the dignity: for, although it was held by some, that in the case of the Earl of *Oxford* the Judges had given their opinion, that, by the descent of a barony upon co-heirs, it became so completely vested in the crown, that no person could claim it, or acquire a title to it without a grant from the crown; yet it was afterwards settled, that where the co-heirship ceased, and there remained only one heir, such sole heir became entitled to it as a matter of right, and not of favour from the crown.

Dugd. Bar.
vol. 2. 363.

§ 166. Sir *Robert Ogle* was summoned to parliament, 4 *Edw.* 4., and the title descended to *Cuthbert Ogle*; who was summoned to parliament 5 *Eliz.* and died in 39 *Eliz.*, leaving two daughters his heirs; *Jean*, married to *Edward Talbot*, a younger brother

to

to the Earl of *Shrewsbury*, who died without issue, and *Catherine*, married to Sir *Charles Cavendish* of *Welbeck*. *Catherine* having survived her sister, and being sole heir to the barony of *Ogle*, obtained special letters patent, 4 *Car.* 1. declaring her to be Baroneſs *Ogle*, of *Ogle* in the county of *Northumberland*, to her and her heirs for ever; a copy of which is given by *Collins*.

P. 412.

§ 167. In this caſe, the confirmation might have been a matter of favour: and, indeed, an opinion ſeems to have prevailed during the reign of King *Charles* 2.; that, where a dignity fell into abeyance, it was in the power of the crown to extinguiſh it. This appears from the letters patent, by which the barony of *Lucas* of *Crudwell* was created; in which there is a proviſo, “ That if there ſhall be more per-
“ ſons than one, who ſhall be co-heirs of her body
“ by the ſaid Earl of *Kent*, whereby the King’s Ma-
“ jeſty, his heirs or ſucceſſors, might declare which
“ of them he pleaſes to have and enjoy the ſaid
“ honour, title and dignity, or might hold the ſame
“ in ſuſpence, or extinguiſh the ſame, at his and their
“ pleaſures; that nevertheleſs the ſaid honour, title
“ and dignity, ſhall not be held in ſuſpence, or extin-
“ guiſhed, but ſhall go to and be held and enjoyed, *Ante, f.*
“ &c.”

§ 168. But the doctrine, that where a dignity fell into abeyance, it might be extinguiſhed by the crown, appears to have been fully diſproved in the following caſe; in which it was determined by the Houſe of
Lords,

Lords, after great deliberation, and assented to by the Crown, that where a dignity falls into abeyance between co-heirs, whenever there is a determination of the co-heirship, by the death of all the co-heirs except one, such one heir becomes entitled to the dignity, as a matter of right.

Coll. 322.
Skin. Rep.
432.

§ 169. In 1694, Sir *Richard Verney*, Knight, claimed the barony of *Broke*, as lineal heir to Sir *Robert Willoughby*, who was summoned to parliament, 7 Hen. 7. the writ being directed *Roberto Willoughby de Broke Chevalier*; to whom succeeded Sir *Robert Willoughby*, who was summoned to parliament by the same title, and sat accordingly temp. Hen. 8.: from him the barony descended to Lady *Elizabeth Greville*, (she having survived her two sisters, who died without issue), from whom it descended to her grand-child and heir, Sir *Foulk Greville*, Knt. (who was created Lord *Broke* to him and his heirs male); but, who dying without issue, the barony descended to *Margaret Lady Verney*, the petitioner's grandmother.

Ante, f. 56.

The Attorney-General argued against this claim, 1st, That a summons by writ did not create an estate in fee: for that anciently several had been so summoned, and yet their sons had never been summoned after them. Nay, sometimes the very person first summoned had afterwards been omitted to be summoned. But he did not design to urge that any farther, but chiefly insisted that even in the time of King *Henry 7.*, when Sir *Robert Willoughby* was first summoned, it was not considered as an estate in fee; urging

urging *Latimer's* case, and, of later times, *Abergavenny's* case, and *Paget's*. 2d, That, if it did descend, it was extinguished in the co-heirs of Lady *Margaret Greville*; urging the Earl of *Oxford's* case.

The counsel for the petitioner replied, that, 1st, as to the baronies of *Latimer* and *Abergavenny*, those honours followed the intail of the lands, as baronies by tenure. As to the resolutions in the Earl of *Oxford's* case, touching the baronies of *Bulbeck*, *Sandford*, and *Badlesmere*, that they were in his Majesty's disposition; they allowed that the King might dispose of them to which of the co-heirs he pleased, during the coparcenèrship, but not to a stranger, nor to the heir male collateral, who had no right thereto, so long as there were heirs general. Antc.

The House of Lords resolved, that the petitioner had no right to a summons to parliament.

It has been already stated, that in consequence of this resolution several Peers, who had baronies by writ in them, were heard by counsel at the bar of the House of Lords, respecting the descent of such dignities, and the ground of the resolution that Sir *Richard Verney* had no right to the barony of *Willoughby de Broke*; being, that where a dignity descended to co-heirs, it was in his Majesty's power to hold the same in suspense or abeyance. The matter was reported by the Lord Keeper; and, the question being put, "Whether, if a person, summoned to parliament by writ, and sitting, die, leaving issue two or more Antc. f. 66. Lords' Jour. vol. 15, 522.

“ more daughters, who all die, one of them only
 “ leaving issue, such issue has a right to demand a
 “ summons to parliament?”—It was resolved in the
 affirmative.

Lords' Jour.
 vol. 15. p.
 634—643.
 671.

The principal objection touching the extinguishment of the barony of *Broke*, by reason of its descending to co-heirs, being removed; Sir *Richard Verney* claimed the barony of *Willoughby de Broke*, as the sole heir of Sir *Robert Willoughby de Broke*.

Sir *Thomas Powis*, as his counsel, read a list of those peers, who had baronies by writ in them, included under higher titles, and also a list of those lords, who then sat in the house by virtue only of original writs of summons, and by descent from baronies in fee; and a list of several noble ladies, who had then such baronies in them, some of whom had been declared baronesses in parliament: and insinuated to the Lords, that, while he was arguing one peer into the house, the king's counsel were arguing several noble dukes and earls out of their baronies, and several sitting barons out of the house. For, if a summons by writ was not an estate in fee, and descendible, then might the king choose, whether he would summon those barons any more to parliament, after the conclusion of the present parliament; and so by that means would subject the peerage to great uncertainties, and destroy all their resolutions and judgments, touching the descent of such baronies.

The king's counsel urged several instances of ancient times against the descent of such baronies, and argued
 against

against the operation of the writ; and that in this case it did not appear, but that the first foundation of the honour might have been by patent, or for life, or in tail male; and vouched *Bromflete's* case, and Lord *Vesey's* writ of summons. He farther insisted, that the descent of the barony to co-heirs did merge or extinguish it, or make it revert to the crown; and that it was in abeyance, by which means it was left to the clutches of the law, so as not to be taken out from thence, by any person whatsoever, otherwise than by a new creation.

The petitioner's counsel replied, that the honour could not be by patent, nor by writ, with a limitation to the heirs male: for that there was issue male from each of the two Sir *Robert Willoughbys*, who yet were not barons; insisting upon the right of the peerage in general, and that, upon the true construction, the title was *Willoughby of Broke*.

After long debate, it was resolved that Sir *Richard Verney* had a right to a writ of summons to parliament, by the title of Lord *Willoughby of Broke*.

A writ of summons was accordingly issued to him; and he was seated in the House of Peers by descent, without ceremony, in the ancient place of his ancestor Sir *Robert Willoughby*, next above Lord *Eure*. Lords Journ.
vol. 15. 668.

§ 170. The same point was again determined in the following case.

Coll. 372.
Lords' Jour.
vol. 21. 266.
339-

In 1720, *Catherine Bokenham* claimed the barony of *Berners*, which had fallen into abeyance; as sole heir of Sir *John Bouchier* Lord *Berners*; the abeyance being then terminated. This petition was referred by his Majesty to the House of Lords; and Lord *Clarendon* reported from the committee of privileges, that search had been made so far back as the reign of *Edw. 3.*, whether any patent had been granted for creating Sir *John Bouchier* a baron; but none could be found.

That there was produced a writ of summons to parliament, 33 *Hen. 6.*, directed *Johanni Bouchier de Berners*, along with several other writs directed to him; and also several writs directed to his grandson and heir. That the committee had inspected the Journals of the House in the reign of *Henry 8.*, and found the name of Lord *Berners* entered therein as present several days.

That it appeared to the committee, that the petitioner was (by the death of her brothers and sisters without issue) become sole heir of Sir *John Bouchier*, Knt., first Lord *Berners*; and was lineally descended from him.

The house resolved, that the said *Catherine Bokenham* had a right to the said barony of *Berners*.

Attainder of
one of two
Co-heirs does
not determine
the abeyance.

§ 171. It has been held by the House of Lords in a recent case, that, where a barony was in abeyance between two persons, the attainder of one of them
for

for high treason did not terminate the abeyance, and give to the other a right to the barony.

§ 172. *Thomas Stapleton*, of *Carleton* in the county *York*, Esq. claimed the barony of *Beaumont*; and stated, that *Henry de Beaumont* was summoned to parliament in the second, third, fourth, and several other years of the reign of *Edward 2.* and sat in parliament. That the barony of *Beaumont* descended to *William Lord Beaumont*, who died 24 *Hen. 7.* without children, leaving an only sister, *Joan*. That the said *Joan* married *John Lord Lovell*, and had issue a son, who died without issue, and two daughters; *Joan*, who married Sir *Brian Stapleton*, to whom the claimant was heir at law, and *Frideswide*, who married Sir *Edward Norris*. That *Frideswide* had two sons, Sir *John Norris*, who died without issue; and *Henry Norris*, who was attainted of high treason in 27 *Hen. 8.* and from whom the Earl of *Abingdon* was lineally descended.

Printed Cases,
Dom. Proc.
1794-5.

That, upon the death of Sir *John Norris*, without issue, the abeyance in the barony of *Beaumont* ceased; and the whole right and claim to the same vested in the heirs of *Joan* the eldest sister. That the petitioner was the heir general of *Henry de Beaumont*, who was first summoned to parliament; and therefore apprehended, and was advised, that he had a legal claim to the said barony.

This petition was referred to the Attorney General (*Sir John Scott*), who reported,—“ That an impor-

“ tant question arose, whether, by the attainder of
 “ *Henry Norris*, the abeyance was determined, and
 “ the heirs of the eldest sister exclusively entitled by
 “ descent to the barony of *Beaumont*, by reason of
 “ the incapacity of *Henry Norris*’s heirs thereby
 “ created, to claim through him? Upon this point
 “ point he humbly certified to his Majesty, that he
 “ had not been able to find any satisfactory determi-
 “ nation; and, inasmuch as this point materially
 “ affected his Majesty’s royal prerogative, and the
 “ principles of law, with respect to the descent of
 “ honours and dignities; he humbly presumed to
 “ submit to his Majesty, that, before any act was done
 “ pursuant to the prayer of the petition, it might be
 “ fitting to refer the whole matter of the petition to
 “ the House of Peers.”

The petition having been referred to the House of Peers, it was contended by Mr. *Stapleton*’s counsel, that the coheirship was determined by the attainder; and that the case of *Charleton Lord Powis* was in point.

Collins, 398.

In that case, Lord *Powis* died seized of the barony of *Powis*, which was created by writ, leaving two daughters, *Joan* married to Sir *John Grey*, and *Joyce*, married to Lord *Tiptoft*. *Joyce* left issue a son, *John* Lord *Tiptoft*, who was created Earl of *Worcester*, and was attainted of high treason, and executed 10 Ed. 4. *Joan* had issue a son, who left issue a son *Richard*, who left issue a son, *John*. Neither *Henry* nor *Richard* were ever summoned to parliament; but *John*, who was
 ten

ten years old when the Earl of *Worcester* was attainted, was summoned to parliament 22 *Edw.* 4. by the title of *John de Grey de Powis*. And, in this case, it could not be said, that *John de Grey* had the barony by favour of the crown; because he was summoned to the first parliament which was holden after the attainder of the Earl of *Worcester*, and his attaining his age of 21 years; when it cannot be supposed he had done any service to his king and country, to merit such a favour.

The Lords referred a question of law to the Judges, viz. “Whether, supposing the claimant to have proved “himself one of the coheirs of the body of *Henry de Beaumont*; and, supposing a barony to have been “created in the said *Henry* and the heirs of his body, “the claimant was then entitled of right to such “barony, according to the state of the pedigree, last “delivered in on his part?”

On the 25th day of *June* 1795, the Lord Chief Justice of the Common Pleas (*Eyre*) delivered the following opinion of the Judges on this point, after stating the question in the precise form in which it appears above.

My Lords, the Attorney-general, on the part of the crown, summed up his objections to the claim, in a very few words. He said, he opposed the claim on this single point, that the claimant Mr. *Stapleton* was not the heir of *Henry de Beaumont*; that it was not enough that he might be a part, a moiety for instance,

of the heir; that he must have the complete character in him. Your Lordships' question supposes Mr. *Stapleton* to have sufficiently made out his pedigree, and that he is to be taken to be one of the coheirs.

Coheirs derive to themselves title to the inheritance of their ancestor, by descent: they are heir to the ancestor. Our books, in particular Sir *Edward Coke's Comment on Littleton*, section of Coparceners, points out the manner in which they claim. They are altogether *unus hæres, unum corpus*: their heirship is *unitas juris*; the whole body of the coheirs, however numerous, must unite to constitute the heir.

To illustrate this doctrine, Sir *Edward Coke* puts the case of the inheritance of coheirs, sued for in our courts: he says, they must all join in a *præcipe*, for they all make but one heir. He puts another case of coheirs, claiming to take under a limitation to the right heirs of *A.*: and he states the law to be, that one of the coheirs standing alone cannot take any thing; for he is not the right heir of *A.* The case, as he puts it, is a particular one; and, in its circumstances, approaches towards the case now under consideration. But I choose to disentangle it, in this part of the argument, of those circumstances, and state it simply as an authority, that one coheir does not come within the description of heir, and cannot claim as heir.

Coheirs hold in coparcenary: they are called coparceners, because they participate in one inheritance, derived to them by one title: though they participate,
our

our books say, no man doth know his part in severalty. They, therefore, occupy that which is capable of occupation, in common ; but, though no one knows his part in severalty, yet each man's quantity of interest in the whole inheritance is well known : for instance, if he is one of two coheirs, he is entitled to a moiety ; if one of three, to a third, and so on : and, if the subject of the inheritance is in its nature partible, lands, for instance, he may sue his writ of partition, and make division of the subject into moieties, thirds, &c. as the case shall be. And, when that is done, instead of participating in one inheritance, each coparcener takes the part allotted to him in severalty. He then loses his character of coparcener, and becomes sole owner of the part allotted to him ; but it must be remembered, that the effect and operation of this partition pursues the nature of his original right in the whole inheritance ; he has still but a part of it, though he holds it in a different manner. This operation of partition is, of necessity, confined to inheritances, the subject of which is in its nature partible : it applies not to inheritances in their nature impartible. Coheirs must, therefore, continue to hold such inheritances for ever, in the same manner as they held partible inheritances before partition ; with this difference only, that the law has provided certain means, adapted to the nature of some impartible inheritances, for enabling coheirs to hold them in coparcenary, with benefit and advantage to the whole body of the coheirs ; and with due regard to the quantity of interest each of the coheirs may claim in the inheritance.

Thus,

Thus, the coheirs of an advowson present by turns ; and the castle goes to the elder coheir, she making compensation to the others ; and other instances might be mentioned.

A peerage is a most transcendant honour and dignity ; but it is still in the eye of the law an inheritance ; and it will descend to coheirs in the same manner, as other hereditaments do descend. The title of the coheirs of a barony is that of *unus hæres, unum corpus* ; it is *unitas juris* : they must take it, and it must vest in them as the heir of the ancestor. This inheritance stands at the head of the class of inheritances, in their nature impartible. But it is an inheritance of such a nature, producing fruits of dignity and of public duty, individual and incommunicable by any of the common means, which the law has provided for the enjoyment of impartible inheritances ; so that, when it happens to vest in coheirs, it necessarily falls into a dormant state. No single coheir can assert a claim to it : for such a claim would be contrary to his interest ; he does but participate in the inheritance : he can therefore sustain no claim to the whole of it ; and this inheritance is so singularly circumstanced, that even the whole body of the coheirs can assert no claim to it, because they are incapable of possessing, or in any manner enjoying it.

When this inheritance is in this dormant state, it is said to be in abeyance : not in abeyance in the ordinary sense of the term, as was observed by Mr. Attorney-General, in which it is applied to an estate in fee-

fee-simple or freehold in suspense, floating, fixing no where, and vesting in no one ; but it simply denotes, that the title to a barony, which has descended upon, and is vested in coheirs, remains in them in an inactive and dormant state, incapable of being asserted or being enjoyed. That none of the ordinary means, provided by law for making impartible inheritances productive to coheirs, could be applied to this inheritance. One remedy, and one only, has been provided by law for the case of a dormant peerage : it is *sui juris*, of a most extraordinary nature, but very suitable to the dignity of the subject to which it is applied. I mean the prerogative right, of calling one of the coparceners, by writ of summons, to sit in the seat of his ancestor. He will, from thenceforth, be in the exclusive possession and enjoyment of the inheritance, and will hold it to him and the heirs of his body ; yet still he is but one of the coheirs of his ancestor, and the rest of the coheirs still remain coheirs : and, in the event of the failure of heirs of the body of that coheir, whom the prerogative hath thus preferred, the other coheir (if but one) would take the whole inheritance ; or, if there were more than one, the barony would again fall into abeyance. I have stated what I take to be the true nature of this abeyance of a barony : it falls into abeyance, because, in point of right, no one coheir can sustain a claim to it ; and because all the coheirs together, though they constitute the complete heir to the ancestor, cannot claim it with effect, and therefore cannot claim it at all. The effect of the prerogative right of calling one of the coheirs to sit in the seat of his ancestor, is, not to change the nature of his ori-

ginal title to participate in the inheritance ; nor does it in any manner enlarge the quantity of his interest in the inheritance, as it stood originally : it takes nothing from the title of the other coheirs ; it does not attract their portion of the heirship, and unite it with that of the coheir preferred ; but it creates a title to sit in the seat of the ancestor, in a great degree collateral to the title by inheritance. The prerogative is only restricted to issue the writ of summons to one of the persons, who has part or share in that title : the interposition of the prerogative is, as I have before observed, *sui juris*, entrusted to the crown, in order to qualify the necessary consequences of the law of descent, to coheirs, as applied to the inheritance of a barony ; and, I apprehend, it proceeds upon the ground of the law being as I have stated it to be. It was with great ability, and very ingeniously turned by the counsel for the claimant, and used to qualify the law of descents itself, instead of the effects of the law. It was not denied that, in general, many coheirs make but one heir ; but it was said, that this would be an inconvenient and an absurd doctrine, as applied to a barony, that the coheirs of a barony were all of the blood of the ancestor, and must all be capable of the honour, and sitting in the seat of the ancestor, inasmuch as the king by his prerogative, could prefer any one of the coheirs, and place him in the seat of the ancestor ; that there were, therefore, in the coheirs of a barony, a plurality of persons, all capable of succeeding to the dignity ; and that they were therefore, in effect, a plurality of heirs. Upon this they proceeded to erect their fabric.

A barony, say they, falls into abeyance, only because there is a plurality of heirs, capable of taking the peerage ; and the law knows not how to select one from amongst them. But this is the office of the *pater patriæ*, entrusted to the crown so long as the necessity exists ; and the necessity exists, so long as the plurality exists. That as the law abhors abeyance, the moment the plurality of persons capable of sustaining the dignity is by any means removed, and only one of the coheirs thus capable of sustaining the dignity is left, the barony is no longer in abeyance : the crown no longer finds any thing, upon which the prerogative can act : and, if the barony is neither in abeyance nor extinct, it must vest in the single coheir, who is thus left without a competitor. If they had built upon solid foundations, it might have been necessary to have gone farther into this case, in order to see, whether the plurality they speak of has been removed, and to have examined with care the actual situation of the other branch of this noble family, the *Norris* branch ; to have considered it, as it stood on the death of Sir *John Norris* without issue, which is the moment when the sole right of this barony is supposed to have vested in the ancestor of the claimant. The situation of the *Norris* branch, after the act of parliament had passed for restoring the issue of *Henry Norris* in blood, and the possible situation of the *Norris* branch, supposing the issue of *Henry* (who was attainted) hereafter to fail, and the issue of his sisters to continue ; out of this examination, many questions of grave and weighty consideration would arise ; and they would require more time for a satisfactory discussion of them, than at this period of
the

the sessions of parliament could probably have been spared.

Your Lordships might possibly entertain a doubt, with regard to these questions, as well as to another question; namely, whether the title to a barony can survive, when it is become impossible, that all the component parts of it can vest in one person. Your Lordships may entertain a doubt, whether, as to questions of this nature, there are the proper parties before you, whom these questions do, in point of inheritance, concern. But, my Lords, upon the best consideration we could give to the case now in judgment, we humbly offer it to your Lordships as our clear opinion, that the argument in support of the plaintiff's title is fallacious: and, he being but a coheir, his claim to be solely entitled to this barony, as it has been made for him, is unfounded.

My Lords, the nature of the prerogative right infers no capacity in the coheir. The prerogative is, on the contrary, a provision for the incapacity of the coheir. There is no plurality of persons capable: the plurality is of persons incapable, either standing alone, or even uniting: the abeyance is not produced, by the law not knowing how to select from among capable persons. The abeyance is, because there is no one capable, and also, because all are incapable: abeyance cannot determine by the removal of a plurality of persons capable; because such a plurality never existed. Abeyance determines by uniting all the detached parts of the title in one, and, by that means, restoring to the title

title activity and capacity to be possessed and enjoyed. And, unless the claimant could make out, that the effect of the actual situation of the other coheir at the period he has chosen to fix upon, namely, the death of Sir *John Norris* without issue, was such, that all the component parts of the title of heirship did unite in this claimant, he can never take this barony out of abeyance by his own strength, or sustain a claim to be solely entitled to it. This is the ground upon which the Attorney General stood; and, we apprehend, he has sustained it.

In this case we have not derived much assistance from authorities or precedents. The case of the barony of *Porwis* was mentioned, and seemed to approach this. We must call that case to the consideration of your Lordships from your Journals; not being informed of the particular grounds of law, on which it proceeded. I will mention one case from *Coke* upon *Littleton*. Supposing this barony not to be extinct, (concerning which we are not called upon to deliver any opinion), and the present claimant be a co-heir, let the situation of the other co-heir be whatever the counsel for the claimant would wish it to be (except that that there is no failure of issue *naturaliter*), the effect of which might be, that the title of that co-heir would run upwards to the common ancestor, and from thence fall down in the course of the descent of the *Stapleton* line, and unite with their title in the person of the claimant; I conceive that one of the cases mentioned by Sir *Edward Coke*, and upon which the claimant's counsel relied for another purpose, proves, that the claimant

claimant cannot make title to the whole inheritance. Sir Edward Coke on the authority of *Fleta* says, if a man be seised of lands in fee, and has issue two daughters, and one of the daughters is attainted of felony; the father dies, both daughters being alive; the one moiety shall descend to the one daughter, and the other shall escheat. It was argued on the part of the claimant, that though one co-heir could not make himself complete heir, to take under a limitation in the case of descent, the law was more favourable to co-heirs. And it is so; but, let the extent of the favour be marked: in the case put, the law pays attention to the real interest of the co-heir, and gives it effect by allowing, in the case of two co-heirs and one attainted, where the attainder prevented the lands from descending in coparcenary, that part of the inheritance, which fairly belonged to the other co-heir, to descend upon her, in the determinate form of an undivided moiety; which proves that she remained in the contemplation of the law but a co-heir, entitled only to participate in the inheritance as she would have done, if her sister had not been attainted: and the utmost favour, that could be found, was to give her the benefit of that participation in the only way, in which she could take it: for, according to the case of *Royston v. Reading*, reported by Mr. Serjeant Salkeld, page 242, there can be no such descent as the descent of a moiety to one coparcener as heir; which affirms the general rule of law, upon which the whole argument rests, that the title of co-heirs must in some manner or other unite in order to entitle any one co-heir to claim as heir to the ancestor.

I forbear

I forbear troubling your Lordships farther : the answer, which the Judges submit to your Lordships, is, that supposing the claimant to have proved himself to be one of the co-heirs of the barony of *Beaumont*, he is not entitled of right to such barony, according to the state of the pedigree last delivered in on his part.

The House of Lords resolved and adjudged, “ that 26 June 1795.
“ it did not appear, that the petitioner was then en-
“ titled to the honour, title, and dignity of Baron
“ *Beaumont*.”

§ 173. Mr. *Stapleton* presented another petition to his Majesty, representing that, having established by evidence that he was the sole heir of *Joan Lady Stapleton*, and one of the co-heirs of *Henry first Baron Beaumont* ; and that, though not exclusively entitled to the said barony, he had proved himself to be one of the rightful heirs of the said barony : But, the said barony being in abeyance, the same was in his Majesty’s disposal : the petitioner therefore prayed, that his Majesty would be graciously pleased to declare, allow, and confirm to him and his heirs the said barony of *Beaumont*.

Printed Cases,
Dom. Proc.
1796.

This petition was also referred to the Attorney-General, and afterwards to the House of Lords ; where it was resolved by the committee of privileges, that the barony of *Beaumont* was vested in *William Viscount Beaumont*, by descent from his father, *John Lord Beaumont*, (who was summoned to and sat in parliament 11 Hen. 6.) as a barony in fee ; that the said

13 March
1798.

barony remained in abeyance between the co-heirs of the said *William*, descended from his sister *Joan*; and that the petitioner was one of those co-heirs*.

Length of
Time does
not bar a
Claim to a
Dignity.
Skin Rep.
437.
Collins, 323.

§ 174. Dignities are not within the statute of limitations, and may therefore be claimed at any distance of time: for, as a dignity cannot be aliened, surrendered, or extinguished, so neither can it be lost by the negligence of any person entitled to it.

Ante, f. 35.

§ 175. In the case of Mr. *Berkley*, respecting the barony of *Botetourt*, it is said:—" There remains only
" to observe, that it is an undoubted maxim with
" regard to honours, that they cannot be extin-
" guished, otherwise than by forfeiture, or by act of
" parliament. Claims to baronies, which have long
" been dormant, are difficult to be made out; but,
" whenever the right happens to be clearly proved,
" the safety and dignity of the peerage are both con-
" cerned, that no length of time should bar, or even
" prejudice, the title. Most of the ancient baronies
" are so merged by the intermarriages of the great fa-
" milies, or so exposed to the objection of forfeiture,

11 Rep. 1.
4 Inst. 335.
Lord Pur-
beck's Case.
Ante.

* Notwithstanding the respect, which is justly due to the very learned opinion of the Judges in this case, yet it may be observed, that, as the doctrine of abeyance was originally founded on the impartible or indivisible nature of a dignity; and as all power of inheriting the barony of *Beaumont*, by one of the co-heirs, is destroyed by the attainder, by which Mr. *Stapleton* is become the only person capable of enjoying it; he must be allowed to have a stronger claim on the crown for a confirmation of the dignity, than perhaps ever existed in a co-heir to a barony.

" that

“ that very few instances have occurred of claims of
 “ the like nature. But, in all those which have oc-
 “ curred, the length of time, during which the
 “ honour has remained dormant, never has formed a
 “ ground of objection. The barony of *Fitzwalter*
 “ was allowed in 1669, after it had been dormant for
 “ 400 years. The barony of *Clifford* was allowed
 “ to the Earl of *Thanet* in 1691; the ancestor,
 “ from whom he claimed, having died in 1605. The
 “ barony of *Willoughby de Broke* was allowed by the
 “ House of Lords, upon a reference from the crown
 “ in 1695; though the honour had been dormant
 “ among co-heirs from the year 1522, upwards of
 “ 170 years. The barony of *Berners* was, in like
 “ manner, allowed in 1720; though it had been
 “ dormant for almost 200 years, no person having
 “ been summoned or sat in parliament by that title
 “ from the year 1539. The barony of *Clinton* was,
 “ in like manner, allowed in 1721; though it had
 “ been merged in a higher title from the year 1572,
 “ and had been for a considerable time in abeyance.

“ These are instances, where the honour has been
 “ claimed by a sole heir, upon the determination of
 “ the abeyance.

“ There are others, where the barony has been
 “ allowed, upon the determination of the abeyance,
 “ by the crown, in favour of one coheir. The case
 “ of the barony of *Le Despenser*, 2 Jac. 1., revived;
 “ allowed, and confirmed to Lady *Mary Fane*, after
 “ it had lain dormant above 200 years, is a prece-

“ dent ; which appears by the record to have passed,
 “ upon very deliberate consideration and advice of the
 “ Lords.

“ The barony of *Mowbray* was revived in 15 *Ch. 1.*
 “ in favour of the family of *Howard*, after it had lain
 “ dormant from the 39 *Edw. 3.*, the date of the last
 “ summons to any person as Baron *Mowbray*, and in
 “ abeyance from 17 *Edw. 4.*, between the families of
 “ *Berkley* and *Howard*. It is in right of this revival,
 “ that the Duke of *Norfolk* claims to be the *Premier*
 “ Baron of *England*.

“ The barony of *Ferrers* of *Chartley* was first re-
 “ vived in 2 *Edw. 4.* in favour of *Walter Devereux*,
 “ though there had been no person summoned under
 “ that title from the 5 *Edw. 2.* On the extinction of
 “ the male line of the *Devereux* family, in 1646, it
 “ remained in abeyance till 1677 ; when King *Cha. 2.*
 “ thought fit to determine the abeyance in favour
 “ of Sir *Robert Shirley*, by whose descendants it has
 “ since been enjoyed.

“ From all these instances, this observation naturally
 “ arises ; that length of time, during which an honour
 “ may have been in abeyance, can neither bar the
 “ right of a sole heir, claiming upon the determina-
 “ tion of the abeyance, by the natural extinction of
 “ the other heirs, nor the right of the crown to revive
 “ the barony by an act of prerogative, determining the
 “ abeyance in favour of one coheir.”

§ 176. It is said in the printed case of the Duchess Dowager of *Athol*, claiming the office of Great Chamberlain of *England*, that length of time is not a bar to the claim of an honour or dignity, as it is of lands. That the Journals of the House of Lords are replete with instances of baronies in fee having been claimed, and the claim admitted, after they had been several centuries in abeyance. And that, whenever the right to a dignity or honour happens to be clearly proved, the safety and dignity, even of the peerage itself, are both concerned, that no length of time shall bar, or even prejudice, the title.

2 Bro. Parl.
Ca. 167, 168.

TITLE XXVII.

F R A N C H I S E S.

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|---|---|
| <p>§ 1. <i>Nature of Franchises.</i>
 2. <i>Franchises annexed to Manors.</i>
 4. <i>Court Leet.</i>
 6. <i>Waifs.</i>
 10. <i>Wreck.</i>
 17. <i>Estray.</i>
 23. <i>Treasure Trove.</i>
 26. <i>Royal Fish.</i>
 27. <i>Forfeitures.</i>
 29. <i>Deodands.</i>
 32. <i>Fairs and Markets.</i></p> | <p>§ 42. <i>A Forest.</i>
 51. <i>A Free Chase,</i>
 57. <i>A Park.</i>
 61. <i>A Free Warren.</i>
 68. <i>A Free Fishery.</i>
 72. <i>Of the Title to Franchises.</i>
 75. <i>How Franchises may be destroyed.</i>
 76. <i>Reunion with the Crown.</i>
 78. <i>Surrender.</i>
 79. <i>Forfeiture</i></p> |
|---|---|

Section 1.

Nature of
Franchises.

Rot. Parl.
v. 2. p. 16.

A FRANCHISE is defined to be a royal privilege or branch of the royal prerogative, subsisting in the hands of a subject, by grant from the King. And formerly, grants of royal franchises were so common, that in the parliament which was held 21 *Edw. 3.* there is a petition from the Commons to the King, stating that franchises had been so largely granted in times past, that almost all the land was enfranchised, to the great *averisement* and *estenyment* of the common law, and in great oppression of the people; and praying the King to restrain such grants for the time to come; to which his Majesty answered, that the franchises which should be granted in future, should be made by good advisement.

§ 2. Franchises are extremely numerous, and of various kinds; but only some of those will be here treated

treated of, which are immediately annexed to, or connected with real property.

§ 3. There are a variety of franchises annexed to manors, the principal of which are, the right to hold a court leet, and to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands: all which were originally a part of the royal prerogative, and were granted by the crown to the persons entitled to those manors.

Franchises
annexed
Manors.

§ 4. A court leet is a court of record, having the same jurisdiction within some particular precinct, which the Sheriff's torn hath in the county. This court is not necessarily appendant to a manor, like a court baron, but is derived from the Sheriff's torn; being a grant from the king to certain lords, for the ease of their tenants, and residents within their manors, that they may administer justice to them in their manors.

Court Leet.
2 Inst. 71.
4 Inst. c. 54.

Colebrook v.
Elliot,
3 Burr. R.
1859.

§ 5. To every court leet is annexed the view of frankpledge; *visus frankplegii*; which means the examination or survey of the frankpledges of which every man, not particularly privileged, was anciently obliged to have nine, who were bound that he should always be forthcoming to answer any complaint.

§ 6. Waifs are goods, which have been stolen, and waived, or left by the felon, on his being pursued, for fear of being apprehended.

Waifs.
Foxley's Case,
5 Rep. 109.

Thus, if a felon, who is pursued, waives the goods, or, thinking that he is pursued, flies away, and leaves the goods behind him; the king's officer, or the bailiff of the lord of the manor, who hath the franchise of waif, may seize the goods to the king's or lord's use, and keep them; unless the owner makes a fresh pursuit after the felon, and sues an appeal of robbery, within a year and a day; or gives evidence against him, whereby he is attainted, &c. in which case the owner shall have restitution of his goods, so stolen and waived.

5 Rep. 109 a.

§ 7. The reason that waifs are forfeited, and that the person, from whom they were stolen, shall lose his property, is, on account of his default in not making fresh suit, to apprehend the felon; for which the law has imposed this penalty on the owner.

3 Hawk.
P. C. 450.

§ 8. Though waif is generally spoken of goods stolen; yet, if a man be pursued with hue and cry as a felon, and he flies, and leaves his own goods, these will be forfeited as goods stolen. But they are properly fugitive's goods, and not forfeited, till it be found before the coroner, or otherwise of record, that he fled for the felony.

5 Rep. 109 a.

§ 9. If the thief had not the goods in his possession when he fled, there is no forfeiture; for, if a felon steals goods, and hides them, and afterwards flies, there is no forfeiture. So, where he leaves stolen goods any where, with an intent to fetch them at another time, they are not waived; and, in these cases,

cases, the owner may take his goods where he finds them. Cro. Eliz. 694.

§ 10. Wreck signifies such goods, as, after a ship has been lost, are cast upon the land: for they are not wrecks as long as they remain at sea, within the jurisdiction of the Admiralty. And where a ship perishes at sea, and no man escapes alive out of it, or is driven on shore, abandoned by her crew, this is called a wreck. Wreck. 2 Inst. 167. 5 Rep. 106. 108.

§ 11. By the common law, all wrecks belong to the king; and this prerogative is founded on the dominion he has over the seas: for, being sovereign thereof, and protector of ships and mariners, he is entitled to the derelict goods of merchants; which is the more reasonable, as it is a means of preventing the barbarous custom of destroying persons, who in shipwrecks approach the shore, by removing the temptations to inhumanity. And this right may, and often does, belong to lord of manors, having the franchise of wreck. Inst. 167.

§ 12. By the statute of *Westminster* 1. 3^o Edw. 1. c. 4. it is enacted, that, when a man or any living creature escapes alive out of a ship cast away, whereby the owner of the goods may be known, the ship or goods shall not be a wreck. 2 Inst. 166.

§ 13. *Flotsam* is, where a ship is sunk, or otherwise perished, and the goods float on the sea; *jetsam* is, when the ship is in danger of being sunk, and, to lighten 5 Rep. 106 a.

lighten the ship, the goods are cast into the sea, and afterwards the ship perishes; *lagan* or rather *ligan*, is, when the goods are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy, or cork, or such other thing that will not sink, so that they may find them again, *et dicitur ligan a ligando*: and none of these goods, which are called *jetsam*, *flotsam*, or *ligan*, are called wreck, so long as they remain in or upon the sea; but if any of them by the sea be put upon the land, then they shall be deemed wreck. So, *flotsam*, *jetsam*, or *ligan*, being cast on the land, pass by the grant of wreck: and, where it is provided by the statute of 15 *Rich. 2. c. 3.* that the Court of Admiralty shall not have cognizance or jurisdiction of wreck of the sea; yet it shall have consueance and jurisdiction of *flotsam*, *jetsam*, and *ligan*: for wreck of sea is, when goods are by the sea cast on the land, and so *infra comitatum*, whereof the common law takes consueance; but the other three are all on the sea, and therefore of them the Admiral has jurisdiction.

2 Inst. 167. § 14. If a ship is pursued by the enemy, and the mariners come ashore, and leave the ship empty, and she comes to land without any person in her; yet she is not a wreck, but shall be restored to the owners.

6 Mod. R. 149. § 15. If a man, either by grant or prescription, has right to a wreck thrown upon another man's land,

of

of necessary consequence he has a right to a way over the same land to take it.

Secondly, the very possession of the wreck is in him, that has such right before any seizure.

Originally, all wrecks were in the crown, and the king has a right to way over any man's ground for his wreck; and the same privilege goes to the grantee thereof.

§ 16. The statute of *Westminster* enacts that, where 2 Inst. 166.
the ship or goods are deemed a wreck, they shall belong to the king, and be seized by the sheriffs, coroners, or bailiffs, and shall be delivered to them of the town; who shall answer before the justices, of the wreck belonging to the king. And, where wreck belongeth to another than the king, he shall have it in like manner.

§ 17. An estray is a beast, that is not wild, found Estray.
within a lordship, and not owned by any man; in which case, if it be proclaimed according to law, at the two next market towns, on two market days, and is not claimed by the owner, within a year and a day, it belongs to the lord of the manor, if entitled to this species of franchise,

§ 18. If the beast strays into another manor within Cro. Eliz. 716.
the year, after it has been an estray, the first lord cannot retake it; for, until the year and day be past, and proclamations made, he has not acquired a property in

in it : and, therefore, the possession of the second lord is good against him.

1 Roll. Ab.
379.

§ 19. If the beast be not regularly proclaimed, the owner may take him at any time ; and, where a beast is proclaimed, as the law directs, if the owner claims it within the year and day, he shall have it again, but must pay the lord for its keep.

5 Rep. 108 b.

§ 20. If the goods of an infant, feme covert, or person in prison or beyond sea, estray, and are proclaimed according to law, if none claim them within a year and a day, they shall be all bound.

1 Roll. Ab.
388.

§ 21. It should be observed, that, if any animal belonging to the king strays into the manor of a subject, it will not be liable to forfeiture : for the grant of the king cannot be supposed to intend farther than his prerogative, which is to take the cattle of common persons.

Cro. Jac. 148.

§ 22. A beast estray is not to be used in any manner, except in case of necessity, as to milk a cow, but not to ride a horse.

Treasure-
trove.

2 Inst. 577.
3 Inst. 58.

§ 23. Treasure-trove is, where any money is found hid in the earth, but not lying upon the ground, and no man knows to whom it belongs ; in which case, it becomes the property of the king, or of the lord of the manor having the franchise. But, if the owner may any ways be known, it belongs to him.

§ 24. As

§ 24. As to the place where the finding is, it seems not material, whether it be hidden in the ground or in the roof or walls, or other part of a castle, house, building, ruins, or elsewhere, so as the owner is unknown. 3 Inst. 132.

§ 25. Nothing is said to be treasure-trove, but gold and silver: and it is the duty of every person, who finds any treasure in the earth, to make it known to the coroners of the county. For the concealing of treasure-trove may be punished by fine and imprisonment. Idem. 2 Hawk. P. C. 67.

§ 26. Royal fish consist of whale and sturgeon, to which the king, or those who have a royal franchise, are entitled, when either thrown on the shore, or caught near the coast. This right is claimed and allowed by the statute *de prerogativa regis*: and *Plowden* observes, that this was not a new law, but a declaration of the common law, as it stood before that statute. Royal Fish. Plowd. 315.

§ 27. Goods of persons, who fly for felonies, are forfeited to those lords of manors, who have royal franchises, when the flight is found upon record. Forfeitures. 5 Rep. 110 b.

§ 28. These are usually called goods of persons put in exigent, *bona et catalla in exigendo positorum*: for, where a person is appealed or indicted of felony, and withdraws or absents himself for so long a time, that an exigent is awarded against him, he forfeits all the goods and chattels which he had at the time of the exigent. Idem.

exigent awarded ; although he should render himself on the exigent, and be found not guilty.

Deodands.
3 Inst. 57.
5 Rep. 110 b.

§ 29. Where a person comes to a violent death by mischance, the animal or thing, which was the cause of his death, becomes forfeited, and is called a *deodand* ; as, if given to God to appease his wrath : and the forfeiture accrues to the king, or to the lord of the manor, having this franchise, from the king ; and it ought to be fold, and the money given to the poor.

Hawk. P. C.
Ch. 67. f. 7.

§ 30. If the person wounded does not die within a year and a day, after receiving the wound, nothing shall be forfeited ; for the law does not look on such a wound as the cause of the person's death. But, if the person dies within that time, the forfeiture shall have relation to the time when the wound was given ; and cannot be saved by any alienation, or other act whatever, in the meantime.

Idem, f. 8.

§ 31. Nothing can be forfeited as a deodand, nor be seised as such, till found by the coroner's inquest to have caused the death of a person. But, after such inquisition, the sheriff is answerable for the value of it, and may levy the same on the town where it fell ; and, therefore, the inquest ought to find the value of it.

Fairs and
Markets.

2 Inst. 220.

§ 32. Another right, frequently annexed to a manor, is that of holding a fair or market ; which is derived from the royal prerogative : for no person can claim a fair or market, except it be by grant from
the

the king, or by prescription, which supposes such a grant.

§ 33. If, therefore, any private person sets up a fair or market, without the king's authority, a *quo warranto* lies against him, and the persons who frequent such fair, may be punished by fine to the king.

Id.
Rex v. Marf-
den, 3 Burr.
R. 1812.

§ 34. If the king grants a patent, for holding a fair or market, without a writ of *ad quod damnum* executed and returned, the same may be repealed by *scire facias*. For, though such fairs and markets are a benefit to the public, yet too great a number of them may become a nuisance, as well as a detriment, to those who have more antient grants.

3 Lev. 222.

§ 35. If a writ of *quod damnum* is deceitfully or improperly executed, it is void: as, where *J. S.*, intending to get a patent for a market every *Tuesday* at *Chat-ham*, took out a writ of *quod damnum*, which was executed on the same day on which it was tested, without notice to the mayor of *Rochester*; it was held void, and repealed by writ of *scire facias*.

Rex v. But-
ler, 2 Vent.
344.

§ 36. If the king grants unto one a fair or market, he shall have, without any words to that purpose, a court of record, called a court of *pie-powders*, as incident thereunto; for that is for advancement and expedition of justice, and for the supporting and maintenance of the fair or market.

2 Inst. 220.
4 Inst. c. 60.

4 Inst. c. 61. § 37. Owners and governors of fairs are to take care, that every thing be sold according to just weight and measure; and, for that, and other purposes, they may appoint a clerk of the fair or market, who is to mark and allow all such weights; and for his duty therein, can only take his reasonable and just fees.

2 Inst. 219. § 38. A right of taking toll is usually annexed to a fair or market, though, in many instances, no toll is due; in which case, it is called a *free fair* or *market*: for toll is not incident to a fair or market, and can only exist by special grant from the king, or by prescription; and, if the toll be unreasonable, the grant will be void.

Heddy v.
Wheelhouse,
Cro. Eliz. 558.

2 Inst. 219. § 39. By the statute of *Westminster*, 1 Ch. 1., it is enacted, that, where persons take outrageous toll, contrary to the common custom of the realm, in market towns, if they do so in the king's town, the king shall seize the franchise into his own hands. And, if it be in another's town, and the same be done by the lord of the town, the king shall do in like manner.

Dixon v.
Robinson,
3 Mod. 107.

§ 40. Where the king grants a fair generally, the grantee may keep it where he pleases, or rather, where he can most conveniently. And if granted to be held in a town, he may keep it in any place in the town.

Curwen v.
Bekeld,
3 Inst. R. 588.

§ 41. Queen *Elizabeth*, by her charter, granted to *Henry Curwen*, lord of the vill and manor of *Workington*, that he and his heirs might hold within the said vill a market every *Wednesday* for ever. By another charter

charter of the 2 Jac. 2., after reciting the former charter, and that the market thereby granted had not, for many years, been used, the king proceeds to grant, ratify, and confirm the same to *Henry Curwen Esq.* and his heirs, in the same words, and in as ample a manner as before, *infra villam de Workington*. The question was, whether the lord of the manor had a right to remove the market-place from one situation to another within the precincts of the vill of *Workington*.

Lord *Ellenborough*.—"If the lord have a grant of
 " a market within a certain place, though he have at
 " one time appointed it in one situation, he may cer-
 " tainly remove it afterwards to another situation,
 " within the place named in his grant. This was long Ante.
 " ago settled in *Dixon v. Robins*, and, in modern
 " times, has been acted upon, in the case of *Man-*
 " *chester* market. There is nothing in reason to pre-
 " vent the lord from changing the place, within the
 " precinct of his grant, taking care, at the same time,
 " to accommodate the public. Neither is there any
 " authority which says, that, having once fixed it,
 " he is compellable ever after to keep it in the same
 " place. In many instances there may be great public
 " convenience in the owner having liberty to remove
 " it; for the buildings in a growing town may take a
 " different direction, away from the old market-place.
 " If the lord, in the exercise of his right, be guilty of
 " any abuse of the franchise, there may be a remedy
 " of another nature. The right of removal, however,
 " is incident to his grant, if he be not tied down to a
 Vol. III. U " particular

“ particular spot by the terms of it. Till it be removed, the public have a right to go to the place appointed, without being deemed trespassers: but after the lord has removed it, of which public notice was given in this case, the public have no longer a right to go there upon his soil. If a private injury has been sustained by any individual, who has been deceived by the lord having holden out to him a particular site for the market-place, in order to induce him to purchase, or build there, for the convenience of it, that may be the subject of an action, to recover damages for the particular injury sustained by that individual; but does not preclude the lord’s general right to remove the market.”

A Forest.
4 Inst. c. 73.

§ 42. Another franchise, annexed to real property, is that of having a forest, chase, park, or warren, with a right of killing all sorts of game therein.

2 Comm. 415. Upon the establishment of the *Normans* in *England*, it became a principle of law, that the right of pursuing and taking all beasts of chase or venary, and such other animals as were accounted game, belonged to the king, or to those persons only, who were authorized by him.

Lib. 2. c. 24.
f. 1.

§ 43. Thus, *Bracton* say: “ *Habet etiam (Rex) de jure gentium in manu sua, quæ de jure naturali deberent esse communia; sicut feras bestias, et aves non domesticas.*”

§ 44. In consequence of this right, the first kings of the *Norman* line not only reserved to themselves the sole and exclusive property of the antient forests, but also created others of greater extent, particularly the New Forest in *Hampshire*; and placed them under the jurisdiction of particular courts, and established a variety of officers, for the purpose of preserving the game in those forests. 1 Inst. 300.

§ 45. *Manwood* has defined a forest to be “a certain territory or circuit of woody grounds and pastures, known in its bounds and privileges, for the peaceable being and abiding of wild beasts and fowls of forest, chase, and warren, to be under the king’s protection, for his princely delight, replenished with beasts of venary and chase, and great coverts of vert, for succour of the said beasts: for preservation whereof, there are particular laws, privileges, and offices, belonging thereunto.” Treat. of the Forest Laws, Ed. 1717.

§ 46. *Manwood* says, that vert and venison are the two great ornaments of a forest. The word *vert* is derived à *viriditate*, greenness; and comprehends all trees and underwood, growing in a forest, and bearing green leaves, which may cover or feed the deer. The word *venison* comprises every beast of the forest or chase, which is taken by hunting: and all the pleas of the forest are, *vel de viridi, vel de venatione*. 345, 350. 4 Inst. 316.

§ 47. It is well known, that the laws, which were made for the preservation of the game in the king’s forests were so cruel, that the repeal of them was most

anxiously required : and that the *charta de foresta*, by which their vigour was mitigated, gave as much satisfaction to the people, as even *magna charta*.

155.

§ 48. Several of these forests were, in course of time, granted by the crown to great lords, as a reward for their services ; by which means, they acquired the royal franchise of a forest. And *Manwood* says that, where the king, being seized of a forest, granted it by letters patent to a subject, by the name of a forest, *habendum cum omnibus incidentibus, appendiciis, et pertinentiis*, the grantee took it as a forest ; and all the officers who belonged to the forest remained as they were before, excepting only a chief justice in eyre.

153.

4 Inst. 314.

1 Inst. 233 a.

§ 49. The same author also says, it appears from the records of the court of the Dutchy of *Lancaster*, that, in the reigns of *Edw. 2.* and *Edw. 3.*, the Earl of *Lancaster* had a forest in the shounties of *York* and *Lancaster*, and executed the forest laws there, as largely as ever any king did before.

Idem.

§ 50. Lord *Coke* says, that beasts of forest are properly hart, hind, buck, hare, boar, and wolf, but legally all wild beasts of venary ; and that it was resolved by the king's counsel, that *capreoli*, (that is) *roes*, *non sunt bestię de foresta*, eo quod fugant alias *feras*.

A Free
Chafe.

§ 51. A free chafe is a right of hunting and killing game over a certain district, derived from a royal grant,

or

or from immemorial usage, which supposes a royal grant.

§ 52. Lord *Coke* says, that beasts of chase are properly buck, doe, hart, hind, roe, fox, martin, hare, boar, and wolf; but, legally, all wild beasts of venary. 1 Inst. 233 a.

§ 53. It is probable, that a chase was never granted over any grounds but those, whereof the grantee was himself seised; and most of the antient grants of free chase and warren, (of which, an infinite number are mentioned by *Dugdale* in his *Baronage*), are confined to the demesne lands of the grantee. But Sir *William Blackstone* observes, that there are many instances of keen sportsmen, in antient times, who have sold their estates, reserving their right of chase to themselves; by which means it comes to pass, that a man and his heirs have sometimes a right of chase over another's ground. 2 Comm. 39.

§ 54. Where the king granted a forest, or any part of a forest, to a subject, by the name of a forest, but without the words enabling him to hold courts, the grantee held it only as a chase. Manw. 159. 4 Inst. 314.

§ 55. The difference, therefore, between a chase and a forest, is, that a chase has no laws peculiar to it; and, therefore, all offenders in chases are punishable by the common law, and not by the laws of the forest. Manw. 49.

Case of
R. v. R. 18.
12 Rep. 22.
4 Inst. 298.

§ 56. It was resolved by all the judges in 5 *Jac.*, that in the case of a free chase, he who hath any freehold within them, may cut his timber and wood growing upon it, without the view or licence of any. But, if he cut so much, that there is not sufficient for covert, and to maintain the game of the king, he shall be punished at the suit of the king. And so, if a common person hath a chase in another's soil, the owner of the soil cannot destroy all the covert, but ought to leave sufficient covert and brouse wood as hath been accustomed.

A Park.
1 Inst. 233 a.

§ 57. A park is an inclosed chase, extending only over a person's own grounds, and is privileged for beasts of venary and other wild beasts of the forest and chase, *tam silvestres quam campestris*.

§ 58. No person can erect a park without a licence from the king; and to a park three things are required. First, a grant or licence from the king: secondly, inclosures by pale, wall, or hedge: thirdly, beasts of a park, such as buck, doe, &c. And, where all the deer are destroyed, it shall no more be accounted a park: for a park consists of vert, venison, and inclosure; and, if it is determined in any of them, it is a total disparking.

Cro. Car. 60.

224.

§ 59. *Manwood* says that, in many forests, there are parks which the owners claim, either by grant from the king, or by prescription. And, if a subject is owner of a forest, he may give licence to another to make and inclose a park within the meers of his forest; and to hold the same so inclosed with all such venison

as the grantee shall put in, to him and his heirs. And this was adjudged a good licence in a claim made in eyre: but, if such park is so slightly inclosed and fenced, that the wild beasts of the forest do enter, the lord of the forest may, in such case, enter and hunt there, at his pleasure.

§ 60. Parks, as well as chases, are subject to the common law, and are not to be governed by the forest laws. 4 Inst. 314.

§ 61. A warren is extremely similar to a chase, and is usually united with it; being a place privileged for the keeping of beasts and fowls of warren. A Free Warren. Manw. 362.

§ 62. Beasts and fowls of warren, are those which may be taken with long-winged hawks; namely, hares, rabbits, roes, pheasants, partridges, quails, rails, woodcocks, mallards, and herons. Manw. 363. 1 Inst. 233 a.

§ 63. A person cannot have a warren, unless by grant of the king or by prescription; but such a right may extend over another's land: and *Bracton* mentions a case, from which it appears, that the king might grant a right of free warren over another's lands. No man, however, can make a warren without the consent of the crown: for he cannot appropriate those animals, which are *feræ naturæ* and *in nullius bonis*, to himself, and to restrain them of their natural liberty, without the king's licence. Bro. Abr. War. Pl. 1. 2 Roll. Ab. 812. Dyer 30. p. 209. 1 Salk. 637. Erac. 56 b. 11 Rep. 87 b. 1 Salk. 637.

Fowler v.
Seagrave,
2 Bullst. 254.

§ 64. Where a person claims warren by charter in all his demesne lands, he cannot extend this to the lands of the freeholders: for, where a person claims warren by charter, he is confined to the words of the charter; otherwise, where he claims the warren by prescription and immemorial usage. And, in a case, which arose in 9 *Cha.* 1., *Rolle* said, that a prescription to have a free warren in a person's own manor was good, as well in the lands of the freeholders as in the lord's demesnes. For, being by prescription, it would be intended, that this liberty was before the creation of the freeholders, whose estates were extracted out of the demesnes of the manor, after the beginning of this prescription.

Rex v. Talbot,
Cro. Car. 311.
Samford v.
Havel,
Godb. 184.

§ 65. It appears from *Dugdale's Baronage*, that almost all those, who had writs of summons to parliament in antient times, obtained grants from the king of free warren in their demesne lands.

4 Inst. 318.

§ 66. Lord *Coke* says, that a man may have a free chase, as belonging to his manor, in his own woods, as well as a warren or park in his own grounds: for the chase, warren, and park, are collateral inheritances, and not issuing out of the soil, as common does. And, therefore, if a man hath a chase in other men's grounds, and after purchase the grounds, the chase remaineth.

Harrison's
Case,
W. Jones, 280.

§ 67. A person may have a warren by prescription in a forest; but, in such case, there must be an allowance of it in eyre, and then a grant is supposed.

Thus,

Thus, where Sir *R. Harrison* claimed a warren in *Windsor* forest, at the justice-seat; but, it not being allowed in eyre, he was fined ten shillings, and the warren was ordered to be destroyed.

§ 68. A free fishery, or exclusive right of fishing in a public river, is a royal franchise; which is now frequently vested in private persons, either by a grant from the crown, or by prescription. A Free Fishery.

§ 69. This right was, probably, first claimed by the crown, upon the establishment of the *Normans*, and was deemed an usurpation by the people: for, by king *John's* magna charta, it is enacted that, where the banks of rivers had been first defended in his time, they should be laid open. And, in the charter of *Hen. 3. c. 16.*, it is enacted, that “no banks shall be defended from henceforth, but such as were in defence in the time of king *Henry* our grandfather, by the same places and the same bounds, as they were wont to be in his time.” And, although it is said in the “*Mirror*,” that this statute is out of use, yet Sir *William Blackstone* observes, that, in consequence of this statute, a franchise of free fishery ought now to be at least as old as the reign of *Hen. 2.* 2 Inst. 29.
2 Comm. 39.

§ 70. A right of free fishery does not imply any property in the soil; in which respect it differs from a several fishery: and, from its being an exclusive right, it follows that the owner of a free fishery has a property in the fish, before they are caught.

1 Inst. 122 a.
a. 7.

§ 71. Mr. *Hargrave* in his notes on the *First Institute* has observed, that both parts of this description of a free fishery seem disputable, and says, that though for the sake of distinction it might be more convenient to appropriate free fishery to the franchise of fishing in public rivers, by derivation from the crown; and though in other countries it may be so considered, yet from the language of our books it seems as if our law practice had extended this kind of fishery to all streams, whether private or public; neither the register nor other books professing any discrimination. That in one case the court held free fishery to import an exclusive right, equally with several piscary, chiefly relying on the writs in *The Register* 95 b. But this was only the opinion of two judges against one, who strenuously insisted that the word *libera, ex vi termini*, implied common, and that many judgments and precedents were founded on Lord *Coke's* so construing it. That the dissenting judge was not wholly unwarranted in the latter part of his assertion appears from two determinations, a little before the case in question. To these may be added the three cases cited by Lord *Coke* as of his own time, and there are passages in other books which favour his distinction.

Smith v.
Kemp,
2 Salk. 637.
Carth. 285.

Upton v.
Dawkins,
3 Mod. 97.
Peake v.
Tucker,
Carth. 286.
Cro. Car. 554.

Of the Title
to Franchises.

1 Inst. 114 a.
& b.

§ 72. With respect to the manner, in which a title may be made to franchises, it is laid down by Lord *Coke*, that, “as to such franchises and liberties as
“cannot be seized as forfeited, before the cause of
“forfeiture appear of record, no man can make a
“title by prescription; because that prescription being
“but an usage *in pais*, it cannot extend to such
“things

“ things as cannot be seised nor had, without matter
 “ of record: as, to the goods and chattels of
 “ traitors, felons, felons of themselves, fugitives, of
 “ those that be put in exigent, deodands, conuſance
 “ of pleas, to make a corporation, to have a sanc-
 “ tuary, to make a coroner, &c. to make conſer-
 “ vators of the peace, &c.

“ But, to treasure-trove, waifes, eſtraies, wrecke
 “ of ſea, to hold pleas, courts of leets, hundreds,
 “ &c. infange thiefe, outfange thiefe, to have a
 “ parke, warren, royall fiſhes, as whales, ſturgions,
 “ &c. fayres, markets, franke-foldage, the keeping of
 “ a gaole, tolle, a corporation by preſcription, and the
 “ like, a man may make a title by uſage, and pre-
 “ ſcription onely, without any matter of record.”

And, in his report of the caſe of the Abbot of *9 Rep. 27 b.*
Strata Marcella, he ſays that every franchise, liberty,
 or privilege, is either derived from a charter, and
 cannot be claimed by preſcription, as *bona et catalla*
ſelonum, &c.; or in preſcription, and uſage *in pais*
 without the help of any charter; as waifs, eſtrays, &c.
 Of franchises which are derived from a charter, they
 are either before time of memory or within time of
 memory. If they were granted before time of me-
 mory, as many of the charters to abbots, &c. are; they
 are granted, either by ſpecial words, or by general,
 old, obſcure, ambiguous, and obſolete words; and be
 ſuch grants of franchises, ſpecial or general, certain
 or obſcure: yet, forasmuch as they are made before
 time of memory, and ſo of themſelves are not any
 record pleadable, they ought to have the aid and
 ſupport

support of some other matter of record within time of memory; as, allowance before justices in eyre, or before the justices of the king's bench, which is more than an eyre, either in case before the justices of the common law, or before the barons of the exchequer, or by force of a confirmation, by a charter of record, of some king within time of memory; and shall not be allowed, but for such part of the grant which has been allowed and confirmed, although it be all in one and the same patent. But usage only, which is but matter of fact, will not support a record, before time of memory, in such case. And, when such ancient grant is general, obscure, or ambiguous, it shall not now be interpreted as a charter made at this day, but as the law was taken at the time when it was made, and according to the ancient allowance or record. But, if the charters were granted within time of memory, then they are pleadable without shewing any allowance or confirmation.

Id.

§ 73. Of franchises, which may be pleaded by prescription, as wreck, waif, estray, &c. as they may be originally claimed by usage, which is a matter *in pais*; so usage may support them, without the aid of any record, either of creation, allowance, or confirmation.

§ 74. Franchises which are entire, such as to have goods of felons, outlaws, &c. or waifs, and estrays, cannot be divided: and therefore, if they descend to two coparceners, no partition can be made of them.

Mountjoy v.
Huntingdon,
Godb. R. 17.

§ 75. Franchises may be destroyed by a re-union with the crown; by surrender of the person entitled to them; or by forfeiture in consequence of a breach of the trust, upon which they were granted.

How Franchises may be destroyed.

§ 76. It was laid down in the case of the Abbot of *Strata Marcella*; that, when the king grants any privileges, liberties, or franchises in his own hands, as parcel of the flowers of his crown, such as *bona et catalla felonum*, &c. within such possessions, there, if they come again to the king, they are merged in the crown; and he has them again, *jure coronæ*. And, if they were before appendant, the appendancy is extinct; and the king becomes seised of them *jure coronæ*. But, when franchises are erected and created by the king *de novo*; there, by the accession of them again, they are not merged: as, if a fair, market, park, warren, &c. are appendant to manors, or in gross; and afterwards they come back to the king, they remain as they were before, *in esse*, not merged in the crown: for they were, at first, created and newly erected by the king, and were not *in esse* before, and time and usage has made them appendant.

Re-union with the Crown.

§ 77. Lord *Coke* says, if *A.* be seised of a manor, whereunto the franchise of waif and estray and such like are appendant, and the king purchaseth the manor with the appurtenances, now are the royal franchises re-united to the crown, and not appendant to the manor. But, if he grant the manor in as large and ample manner as *A.* had, &c. it is said, that the franchises

1 Inst. 121 b

franchises shall be appendant (or rather appurtenant) to the manor.

Surrender.

§ 78. Franchises may be destroyed by a surrender to the crown; and there are several instances of corporations surrendering their charters.

Forfeiture.

12 Mod. R.
271.

§ 79. Where the object of a franchise is perverted, and there is either a misuser, or an abuser of it, the franchise is forfeited and lost. And it is said by Lord Chief Justice *Holt* in a modern case, that all franchises are granted, on condition that they shall be duly executed, according to the grant: and, if the grantee of such franchises neglect to perform the terms, the patents may be repealed by *scire facias*.

Bro. Ab. Tit.
Fran. pl. 10.

§ 80. Non-user is also a cause of forfeiture. And therefore if a vill be incorporated by the king before time of memory, and the franchise never was used within time of memory, the franchise is lost.

2 Hawk.
P. C. c. 11.
f. 5.

§ 81. The franchise of holding a court leet will be forfeited, not only by acts of gross injustice, but also by bare omissions and neglects; especially if often repeated, and without excuse.

Totterfall's
Case,
W. Jones,
283.

§ 82. *George Totterfall* claimed, at the justice-seat of the forest of *Windfor*, a court leet within his manor of *Finchamstead*. The Attorney General desired, that it might be inquired, 1st, If he had used it. 2d, If he had an able steward to discharge the office: for the want of that was also a cause of seisure. 3d, if he had

had officers, and those things, which are for the execution of justice, as constables, ale-tasters, &c. and pillory and stocks, and cucking stool, &c. 4th, If he punished bakers more than three times, and did not set them in the pillory. All these were causes of seisure, till he paid a fine for the abuse, and replevied his franchise. Mr. *Totterfall* himself, being called and asked concerning his court leet, confessed that he had not used it a great while; nor were there proper officers or other things for the execution of justice: but he said, it appeared by ancient rolls, that there had been a leet there. And, being asked to what leet his tenants went, he said they went to the Sheriff's torne, and paid head-silver there. Upon which Mr. Attorney said, that Mr. *Totterfall* could have no leet: for all leets were drawn out of the Sheriff's torne, which is the leet in the king's hands; and head-silver is *certum late*, and no man shall be subject to two leets; and, therefore, there could be no allowance of the leet, unless the king should be put out of that, which (for aught he knew) he had ever had. So judgment was given against him for the leet.

§ 83. Upon a motion for an information in the nature of a *quo warranto*, against one *Bridge* for holding a court leet; it appeared that in 14 *Jac.* 1. the crown granted to *R. Meller* and his heirs and assigns, the privilege of holding courts leet. * No mesne conveyance appeared till 1702, when, and in 1708, 1719, and 1721, there were conveyances of the manor, with all courts thereunto belonging, to those under whom the defendant claimed. In the deed of conveyance

Darell v.
Bridge,
1 Black. R.
46.

conveyance to him in 1739, courts leet were expressly conveyed. In 1740 the defendant held a court leet, the first within the memory of any one living, though courts baron had been frequently held. It was argued that the defendant could not deduce any title under the original grant, or if he could, yet that non-user was a disclaimer, and a forfeiture of such a franchise. On the other side it was contended that the possession of the grant together with the land, was an evidence of right, and that it would be of very pernicious consequence to grant these informations, whenever a lord could not deduce a title by mesne conveyances. The court said that as there appeared no exercise of the grant till 1740, there was strong suspicion of some defect in the title; and therefore it must go to be tried by a jury. And the rule for an information was made absolute.

Bro. Ab. Tit.
Franchise,
pl. 14.

§ 84. Where a person has a franchise to hold a market every week, on the *Friday*, and he holds the *Friday* and the *Monday*, in this case nothing shall be forfeited, but that which he hath purprised. But he, who has a fair to hold two days, and holds it three days, forfeits the whole. So, where a man has a market, to hold the *Saturday*, and he holds it another day, the market shall be forfeited; and he shall be fined for the misusing.

Idem. pl. 22.

§ 85. If the king grants to a person a fair for one day in the year, and the grantee holds a fair two days, and claims this upon process in the exchequer, he shall forfeit his franchise. But, if he claims one day

by the patent, and another by prescription, which is found false in the prescription, yet he shall not forfeit his patent.

§ 86. If a man has several franchises, and the one does not depend upon the other; there, if he misuses any, he shall not forfeit all, but only those which are misused. But, if one depends upon the other, there, if he misuses the one, all shall be seized and forfeited to the king.

Bro. Ab. Tit.
Franch. pl. 14.

Finch, 38.

TITLE XXVIII.

R E N T S.

CHAP. I.

Of the Origin and Nature of Rents.

CHAP. II.

Of the Incidents to Rents.

CHAP. III.

Of the Discharge and Apportionment of Rents.

CHAP. I.

Of the Origin and Nature of Rents.

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| <p>§ 1. <i>Origin of Rents.</i>
 6. <i>Of Rent Service.</i>
 8. <i>Of a Rent Charge.</i>
 12. <i>Of a Rent Seck.</i>
 13. <i>Other Sorts of Rents.</i>
 17. <i>Out of what a Rent may issue.</i>
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 71. <i>Of Distress for Rent.</i>
 73. <i>Condition of Re-entry.</i>
 76. <i>Clause of Entry.</i>
 78. <i>Right of Entry by Way of Use.</i>
 79. <i>Ejectment.</i>
 80. <i>Courts of Equity.</i>
 82. <i>Actions of Debt and Covenant.</i></p> |
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Section 1.

Origin of
Rents,
Tit. 8. c. 1. § 2.

IT has been stated, that where the great lords enfranchised their villains, they still employed them in the cultivation of their estates, which they granted to them either from year to year, or for a certain number of

of years, reserving to themselves an annual return from the tenant, of corn or other provisions. And hence the lands, thus granted, were called *farms*, from the Saxon word *feorm*, which signifies provisions.

§ 2. This compensation or return for the use of land thus let, acquired the name of *redditus*, rent; which is defined by Lord Chief Baron *Gilbert* to be an annual return, made by the tenant either in labour, money, or provisions, in retribution for the land that passes. Gilb. Rents, 9.

§ 3. It follows, that, although rent must be a profit, yet there is no occasion that it should consist of money: for capons, spurs, horses, and other things of that nature, may be reserved by way of rent: and it may also consist of services, or manual labour, as to plough a certain number of acres of land, &c. 1 Inst. 112 a.

§ 4. The profit, reserved as rent, must be certain, or that which may be reduced to a certainty by either party; for, it is a maxim in law, that *id certum est, quod certum reddi potest*. It must be payable yearly; though it need not be reserved in every successive year, but will be good, if reserved in every second or third year. Idem.

§ 5. A rent must issue out of the thing granted, and not be a part of the thing itself: for Lord *Coke* says, a man cannot reserve a part of the annual profits themselves, as to reserve the vesture or herbage of the land. Idem.

Of Rent Ser-
vice.

Lit. f. 213.

§ 6. There were three kinds of rent, known to the common law ; namely, rent-service, rent-charge, and rent-seck. Where a tenant holds his land by fealty and certain rent, it is a rent-service : and this was the only kind of rent, originally known to the common law ; a right of distress was inseparably incident to it, as long as it was payable to the lord, who was entitled to the fealty ; and it was called a *rent-service*, because it was given as a compensation for the military or other services, to which the land was originally liable.

Tit. 1. f. 34.
Tit. 2. c. 1.
f. 28.

§ 7. We have seen that, in consequence of the statute of *quia emptores*, if a person makes a feoffment in fee, or gift in tail ; with a limitation over in fee, the feoffee or grantee will hold of the superior lord by the same services, which the feoffor was bound to perform to him. It follows, that, upon conveyances of this kind, no rent-service can be reserved to the grantor, because he has no reversion left in him ; and, as the grantee does not hold of him, he is not bound to do him fealty. But if, upon a grant in tail or for life, the grantor keeps the reversion, and reserves to himself a rent, it will be a rent-service ; because fealty and a power of distress are incident to such reversion.

Of a Rent
Charge,
Lit. f. 217.
1 Inst. 143 b.

§ 8. Where a rent was granted out of lands by deed, the grantee had no power to distrain for it ; because there was no fealty annexed to such a grant. To remedy this inconvenience, an express power of distress was inserted in grants of this kind ; and it was then called a rent-charge, because the lands were charged with a distress.

§ 9. Rent-

§ 9. Rent-charges are of great antiquity, and were probably first adopted for the purpose of providing for younger children. They were considered as contrary to the policy of the common law: for the tenant was thereby less able to perform the military services, to which he was bound by his tenure. And the grantee of a rent-charge was under no feudal obligations: for which reason, a rent-charge is said to be against common right.

§ 10. A rent, granted for equality of partition between coparceners, is called a *rent-charge of common right*; because the coparcener has given a valuable consideration for it. Gilb. 19.
Lit. f. 252.

§ 11. A rent, granted to a widow out of lands of which she was dowable, in lieu and satisfaction of dower, may be distrained for, upon the same principle. So, of a rent granted in lieu of lands upon an exchange. 1 Inst. 169 a.

§ 12. A rent-seck, or barren rent, is, in effect, nothing more than a rent, for the recovery of which no power of distress is given, either by the rules of common law, or the agreement of the parties. Of a Rent
Seck.

§ 13. Although every species of rent is comprised in the preceding divisions, yet there are some kinds of rents, which are known by particular names. Rents of assize are the certain established rents of the freeholders and ancient copyholders of several manors. Other Sorts
of Rents.

Those of the freeholders are frequently called *chief rents*, *redditus capitales*: and both sorts are indifferently denominated quit-rents, *quieti redditus*; because, thereby, the tenant goes quit and free of all other services.

Doug. R.

627 n.

1 Inst. 143 b.

n. 5.

2 Inst. 44.

§ 14. A fee-farm rent is a perpetual rent, reserved on a conveyance of the fee-simple. And Lord *Coke* says, that, if a rent be to the whole value of the land, or to the fourth part of the value, it is called a *fee-farm*. Mr. *Hargrave* has observed on this passage, that the true meaning of a fee-farm is a perpetual farm or rent, the name being founded on the perpetuity of the rent or service, not on the *quantum*. And, that the sometimes confining the term of fee-farm to rents of a certain value probably arose, partly from the statute of *Gloucester*, which gives the *cessavit* only where the rent amounts to one-fourth of the value of the land; and partly from its being not usual, on grants in fee-farm, not to reserve less than a third or fourth of such value.

Vide Brad-

bury v.

Wright,

Doug. R. 624.

§ 15. After the statute of *quia emptores*, granting in fee-farm, except by the king, became impracticable; because the grantor parting with the fee is, by operation of that statute, without any reversion; [and, without a reversion, there cannot be a rent-service.

§ 16. A perpetual rent may, however, be reserved on a grant of lands in fee: and, if a power is inserted
in

in the conveyance for the grantor, his heirs and assigns, to distrain for the rent when in arrear, and also a power to enter and receive the profits till all arrears shall be paid, the rent is good as a rent-charge, but not as a fee-farm.

§ 17. A rent must, in general, issue out of lands or tenements of a corporeal nature, whereto the grantee of the rent may have recourse, to distrain: and, therefore, a rent could not formerly be reserved out of an advowson in gros, tithes, or other incorporeal hereditaments.

Out of what
a Rent may
issue.
Gilb. 20.
1 Inst. 47 a.
142 a.

§ 18. Lord Chief Baron *Gilbert* says, the reason why a rent cannot issue out of an incorporeal hereditament is, because every incorporeal right, till by age it was formed into a prescription, did originally rise by grant from the crown; and such grants seem to have been made for particular purposes. As the grant of a fair to be under the protection of the lord. The grant of common, for the benefit of the beasts of every one of the tenants. And, therefore, to let such incorporeal inheritances for rent, was esteemed contrary to the design and purpose of such grants. The corporeal rights of the feud were trusted to the lord to create a dependency, for the better service of the government. And, therefore, as he might hire them for the personal service and attendance of tenants, so, for the same reason, he may do it for his own profit, since such profit makes him better able to serve the government.

Rents, 22.

1 *Inst.* 47 *a.*

§ 19. There is, however, one exception* to this rule. A rent may be reserved upon a grant of an estate in remainder or reversion: for, though the grantee cannot distrain during the continuance of the particular estate, yet there will be a remedy by distress, whenever the remainder or reversion comes into possession.

Gibb. 22.

§ 20. A rent may be reserved to the king out of an incorporeal hereditament; because, by his prerogative, he may distrain all the lands of his lessees for such rent: and, therefore, as he has a remedy, there is no reason that such a reservation should be void.

1 *Inst.* 47 *a.*

§ 21. Where a lease is made of the vesture or herbage of land, a rent may be reserved; because the lessor may come upon the land to distrain the lessee's beasts feeding thereon.

2 *Roll. Ab.*
446. pl. 7.
Bro. Ab. Tit.
Affise, pl. 2.

§ 22. A rent cannot be reserved out of a rent; and, therefore, if a person grants lands in tail rendering rent, and after, grants the rent for life, or in tail rendering rent, this is a void reservation, because it passes as a rent-sock. And if *A.* has a rent-service or rent-charge, and grants it to another for term of life by deed indented, rendering to *A.* certain rent, the reservation is void; because rent cannot be charged with other rent; for rent cannot be put in view.

Keilw. 161.

§ 23. A rent cannot be reserved out of tithes by a layman: but, by the statute 5 *Geo.* 3. c. 17., it is enacted, that leases, made by ecclesiastical persons, of
tithes

tithes or other incorporeal hereditaments, shall be good ; and that the rents, reserved in such leases, may be recovered by action of debt.

§ 24. It should, however, be observed, that, if a lease be made of an incorporeal inheritance, reserving rent, such reservation is good to bind the lessee by way of contract, for the non-performance of which, the the lessor shall have an action of debt ; because, if the lessee undertake to pay such an annual sum by his deed, such undertaking gives the lessor a right to it ; and the law, in all cases, gives remedies adequate and correspondent to every man's right.

Dean of
Windsor v.
Glover,
2 Saund. 302.

Dalston v.
Reeve,
1 Ld. Raym.
77.

§ 25. If a person grants a future interest in lands, as a lease for years to commence *in futuro*, he may reserve a rent immediately : for it will be a good contract to oblige the lessee, and to ground an action of debt ; and the lessor may likewise have his remedy by distress for the arrears, when the lessee comes into possession.

2 Roll. Ab.
446.

§ 26. With respect to the conveyances, in which a rent-service may be reserved, it may be laid down as a general rule, that a rent-service may be reserved in every conveyance which passes any estate to the tenant, or enlarges any estate already in him. For, the rent being a return for something given, it follows that, where no estate passes by the conveyance, there can be no return. Besides, the thing given, was antiently in the nature of a pledge for the rent ; and, therefore, ought to be such as the giver might formerly have re-

Upon what
Conveyances,
Gilb. 22.
1 Inst. 144 a.

vested

vested himself in, and now may have recourse to for a distress, if the rent is unpaid.

1 Inft. 193 b. § 27. Lord *Coke* says, that a rent may be reserved upon a release that enlarges or creates an estate, or that enures by way of *mitter l' estate*. But Lord Chief Baron *Gilbert* seems to doubt, whether a rent-service can be reserved on a release that enures by way of *mitter l' estate*, as, where one joint-tenant releases to another; for the release passes an estate in fee-simple; and, the releasee being in from the first feoffor, there can be no tenure of the releasor, and, consequently, the rent must be seck, unless there be a power of distress in the deed.

1 Inft. 193 b. § 28. Lord *Coke* says, a rent-service cannot be reserved on a release, that enures by way of *mitter le droit*, or by extinguishment; because, in such case, there is no reversion left in the releasor to create a tenure: and, therefore, if a lessee surrenders his estate, reserving rent, the reservation is void. But Lord Chief Baron *Gilbert* observes, that a reservation of rent may be good by way of contract, upon a surrender of a lease for years, which will be a sufficient foundation for an action of debt.

Vide Tit. 32. § 29. At common law, no rent could be reserved on a bargain and sale to uses; but, now, such a reservation would be good.

Winter's case, 2 Roll. Ab. 448. § 30. There may be several reservations of various rents in the same conveyance. As, where a lease was made

made of three manors, reserving for one a rent of 6*l.*, for another a rent of 5*l.*, and for the third a rent of 10*l.*, with a condition of re-entry into the whole for non-payment of any part : It was held, that these several reservations of rent created several tenures, demises, reversions, and rents.

§ 31. Tenant in tail of the manor of *C.* leased the site and demesnes of the manor, and also all that manor of *C.* and all lands, &c. to the same belonging, for twenty-one years ; rendering for the site therewith letten 6*l.* 6*s.* 8*d.* and rendering for the said manor and premises therewith letten 9*l.* 10*s.* Resolved by all the justices, that these were several reservations.

Tanfield v. Rogers, Cro. Eliz. 340.

§ 32. A lease was made of three manors, *viz.* *D. E.* and *F.*, reserving for *D.* 5*l.*, for *E.* 10*l.*, and for *F.* 10*l.* *per ann.* ; upon condition that if the said rents, or any of them, or any part, &c. were behind, the lessor might re-enter into all : and afterwards he sold the reversion of one of the said three manors to *W.* *W.* in fee, and afterwards sold him the other two manors : the rent was in arrear for one manor, and thereupon the vendee entered into all three. Adjudged that his entry was not lawful : for, though the words were joint, yet the reservation and the rents were several.

Lee v. Arnold, 4 Leon. 27.

§ 33. *A.* seised of *White Acre*, *Black Acre*, and *Green Acre*, leases all three to *J. S.* for ninety years, rendering for *Black Acre* 3*s.* 4*d.*, for *White Acre* 10*s.*, and

Hill's case, 4 Leon. 187.

and for *Green Acre* 20s. quarterly, with clause of re-entry, if any part or parcel of the said rent should be behind, &c. *W. R.* purchased the reversion of *Black Acre*, and brought ejectment for 10d. for one quarter's rent, and had judgment : for these are several reservations and conditions. And a difference was taken between this and *Winter's* case, the rent in that being originally entire, whereas here it is originally several : and in that case the condition was, that if any part of the rent be behind, the lessor should re-enter into the whole.

§ 34. But, where there is one reservation of rent in gross, at first ; though it be afterwards divided and severed into different parts ; yet it will be one entire rent.

Knight's case,
5 Rep. 54.

§ 35. Thus, where the prior of the order of *St. John of Jerusalem* made a lease of divers houses in *Clerkenwell* for years, yielding the yearly rent of 5*l.* 10*s.* 11*d.* *videlicet*, for one house 3*l.* 0*s.* 11*d.*, for another 20*s.*, and for the other house several rents, residue of the said rent of 5*l.* 10*s.* 11*d.* ; with condition that, if the said rent of 5*l.* 10*s.* 11*d.* was behind in part or in all, that then the prior and his successors should re-enter. It was resolved, that this was one reservation of the rent in gross at the first ; and the *videlicet* afterwards did not make a severance of it as the case was, but was rather a several declaration of the several values of each parcel ; by which it appeared how, and at what rates, the whole rent was reserved.

§ 36. The law will, in some cases, make a rent several: as, if two tenants in common make a lease upon condition, rendering rent, the law will construe the demise, the condition, and the rent, to be several; because the tenants in common have several reversioners. Moor R. 202.

§ 37. So, if a lease were made to a bishop or dean in his public capacity, and to a private individual, reserving rent; the reservation would be several. Id.

§ 38. With respect to a rent-charge, it may be created either at common law, by a grant; or else by the operation of the statute of uses; which last has become the most usual manner. As, where lands are conveyed to trustees, to the use, intent, and purpose, that *A. B.* may receive thereout an annual rent of 100*l.* during his life; the statute of uses (§ 4.) enacts that the person to whom such rent is limited, shall be deemed to be in possession and seisin of the same rent, of and in such like estate as he had in the use of the said rent. How a Rent-charge may be created.
Vide Tit. 11. ch. 3. f. 4.

§ 39. The only mode of acquiring seisin in deed of a rent is, by the actual receipt of it, or of a part of it: and formerly it was usual, where a freehold estate in a rent-charge was granted, to pay the grantee a penny in the name of seisin of the rent. But, in the case of rent-service, the person entitled to the rent cannot acquire a seisin in law, until the rent becomes due, and he receives it, when he will acquire a seisin in deed. Of Seisin of Rent.
Tit. 5. c. 1. f. 14.

§ 40. With

To whom
Rents may be
reserved,
f. 346.
1 Inst. 143 b.

§ 40. With respect to the persons, to whom a rent-service may be reserved; *Littleton* lays it down as a certain rule, that no rent-service can be reserved upon any feoffment, gift, or lease to any person but the feoffor, donor, or lessor, or to their heirs; and in no manner to a stranger. The reason of this rule is, because the rent is payable as a return for the possession of the land, and can therefore be only made to the person, from whom the land passes.

Gilb. 61.

§ 41. As there can be no reservation of rent-service to a stranger, during the life of the lessor, so a rent-service cannot be reserved after the death of the lessor to any person but the reversioner: for to him the land would belong, if it were not demised.

2 Roll. Ab.
447. pl. 2.
2 Saund. 370.

§ 42. If a person makes a lease to commence after his death, reserving rent to his heirs; this will be deemed a good rent-service arising in the heir, not by way of purchase, but as incident to the reversion descending to the heir; and, therefore, may be released by the ancestor, during his life, which it could not be, if it was a new purchase in the heir.

Oates v. Frith,
Hob. 130.

§ 43. But, where a father and his son and heir apparent demised land for years, to begin after the death of the father, rendering rent to the son; the father died; the lessee entered; and, the rent being behind, the son distrained. It was resolved, that this reservation of rent was utterly void: for, although the son did prove heir, it bettered not the case by the event; but the reservation must have been to the heir

or heirs of the lessor, by that name; for that is the only word of privity in law requisite in the reservation of rents; for the heir is *eundem persona cum antecessore*.

§ 44. Where a rent is reserved generally, without specifying to whom it shall be paid, it will go to the lessor, and after his death to the person, who would have inherited the land if no such lease had been made. If the reservation be to the lessor and his heirs, the effect will be the same; provided the lessor is seised in fee.

1 Inst. 47 a.

Vide 1 Inst. 12.

§ 45. A tenant in special tail leased for years, reserving a rent to himself, his heirs and assigns; and the question was, to whom it should go, after the death of the lessor, the estate having descended to a person, who was not heir at law to the lessor. Lord Chief Baron *Widdrington* laid down the following points: 1. Where no person in particular is named to receive the rent, it shall go to the heir together with the reversion. But, where the lessor particularizes the person, there the law will not carry it farther: for the agreement of the parties prevents the construction of law. 2. Where the reservation is special, and to improper persons, there the law follows the words. 3. Where the words are general, they will be expanded according to law.

Cother v. Merrick,
Hard. 91.

It was determined in this case, that the rent should go with the reversion to the special heir in tail, though it was reserved to the heirs generally: for the word heir should be taken in that sense which would best

answer

answer the nature of the contract; which was, that those, who would have succeeded to the estate, if the lease had not been made, should enjoy the rent.

1 Infl. 47 a.

§ 46. If a rent be reserved to the lessor and his assigns, the rent will determine at his death: for the reservation is good only during his life. So, if rent is reserved to him, and his executors, he having the freehold, it will determine at his death; because the reversion, to which the rent is incident, descends to the heir.

1 Vent. 161.

§ 47. If a lease be made of a term for years, reserving rent to the lessor and his heirs, such rent will determine by the death of the lessor: for the heir cannot have it, as he could not succeed to the estate, being only a chattel, and the executor cannot have it, there being no words to carry it to him.

Sacheverell
v. Frogate,
2 Saund. 367.

§ 48. Where a rent was reserved to the lessor, his executors, administrators, and assigns, yearly *during the term*; it was resolved that it should go to the heir of the lessor: for, although there was no mention of the heirs in the reservation, yet there were words, which evidently declared the intention of the lessor, that the payment of the rent should be of equal duration with the lease; the lessor having expressly provided, that it should be paid during the term; and consequently the rent must be carried over to the heir, who came into the inheritance after the death of the lessor, and would have succeeded in the possession of the estate, if no lease had been made; and, if the
lessor

lessor had assigned over his reversion, the assignee would have the rent as incident to it; because the rent was to continue during the term, and must therefore follow the reversion, since the lessor made no particular disposition of it, separate from the reversion.

§ 49. Where no reversion is left in the lessor, and the rent is reserved to his executors, administrators, and assigns, it will go to them and not to the heir.

§ 50. A tenant for three lives, to him and his heirs, assigned over his whole estate, reserving to himself, his executors, administrators, and assigns, a rent of 10*l.*; with a proviso that upon non-payment the assignor and his heirs might re-enter. And the assignee covenanted to pay the rent to the assignor, his executors and administrators. The question was, whether this rent should go to the heir or executor of the assignor. It was decreed by the master of the rolls, that the rent should go to the executor; as it was reserved to him, and there was no reversion left in the assignor, to which the rent was incident so as to carry it to the heir. It was also held, that the covenant to pay the rent to the executors and administrators of the assignor was good and binding, both in law and equity: and, though the proviso was that, in case of non-payment of the rent, the assignor and his heirs might re-enter; yet the court thought this immaterial, as in equity the heir must, in this case, be looked upon as a trustee for the executor.

Jenison v.
Lexington,
1 P. Wms.
555.

This cause came on again before Lord *King*; who was of opinion, that, there being no reversion, the rent might be well reserved to the executors during the three lives; and decreed accordingly.

1 Inst. 214 a.
W. I.

§ 51. Lord *Coke* says, that if tenant for life and the person in reversion join in a lease for life, or gift in tail, by deed, reserving a rent; this shall enure to the tenant for life only, during his life, and after his death to the person in reversion.

1 Rep. 139 a.

§ 52. It is said in *Chudleigh's* case, that if a feoffment in fee be made to the use of one for life, and after to the use of another in tail, with remainder over, with power to the lessee for life to make leases, so that he reserved the accustomed rent, payable to all those who should have the reversion: If tenant in tail made leases according to this power, the lessees derived their interest out of the first feoffment; how then could the reservation of the rent be good, and how could the heir or the person in remainder come at it?

Vide Tit. 32.

§ 53. This doubt, however, appears to have been removed by the following determinations.

Harcourt
v. Pole,
1 And. 173.

Thomas Lovet levied a fine to the use of himself for life, and after his decease to his executors for twelve years; remainder to his first and other sons in tail, remainder over, with a power to *T. Lovet* to make leases not exceeding 99 years. *Thomas Lovet* made a lease for 60 years, rendering annually to the said

Thomas

Thomas Lovet, during the term, and after his decease to such person and persons to whom the reversion or remainder of the premises should from time to time belong, by the said limitation of the uses, the sum of 3*l*.

It was agreed by the court, that the lease was good enough; and that it was a rent, which was distrainable by those in remainder, as they happened to be immediate to the lease.

§ 54. *William Whitlock*, being tenant for life, under a declaration of uses of a fine, with remainder to his son in tail, remainder over, with a power of leasing, demised the premises, reserving rent to himself, his heirs and assigns, and to such other person or persons as should be entitled to the inheritance of the said premises after his decease. It was objected, that this reservation was void, as rent could only be reserved to the lessor, donor, or feoffor, and their heirs, and not to persons only privies in estate, as remainder-men and reversioners. But it was resolved, that the reservation was good, for the reasons, which will be explained in a subsequent title. That, if a reservation had been to the lessor, and to every person to whom the inheritance or reversion of the premises should appertain during the term, it would have been good: for the law would distribute it to every one, to whom any limitation of the use should be made. And it was agreed, that the most clear and sure way was, to reserve the rent yearly during the term, and leave the

Whitlock's case,
8 Rep. 69 b.

Title 32.

law to make the distribution, without an express reservation to any person.

At what time payable.

§ 55. With respect to the time, when rents are payable, it is either by the particular appointment of the parties in the deed, or else by appointment of law. But the law will never control the express appointment of the parties, when such appointment will answer their intention.

Lat. 264.

3 Bull. 329.

§ 56. Where rent is reserved generally it is payable at the end of the year. But if rent be reserved, *annuatim durante termino prædicto*, the first payment to begin two years after, this will control the words of reservation.

Harrington
v. Wife,
2 Roll. Ab.
450.

§ 57. If rent is made payable at the two most usual feasts, without specifying them; the law will construe this to mean *Michaelmas* and *Lady Day*; because these are the days usually appointed in contracts of this nature for such payments.

Idem, 449.

§ 58. If a lease be made for years, provided the lessee shall pay 10*l.* at *Michaelmas* and *Lady Day*, by even portions, during the term; although the word annually be omitted, yet the law will construe it to be so, because it is made payable during the term.

2 Roll. Ab.
450.

§ 59. If a lease is made on the first of *May*, or at any other time, reserving rent payable quarterly, this shall be intended quarterly from the date of the lease, and not at the usual feasts.

§ 60. If a lease is made, reserving rent at the two usual feasts, without saying "by equal portions;" the rent shall, notwithstanding, be paid by equal portions.

§ 61. A lease was made for twenty years reserving rent during the term, payable at *Michaelmas* and *Lady Day*, or within thirteen weeks after every of the said feasts. It was resolved, that the rent was not payable until the end of the thirteen weeks; the disjunctive being evidently added for the benefit of the lessee.

Clun's case,
10 Rep. 127.

§ 62. In a subsequent case, a tenant for life made a lease for 21 years, rendering rent at *Michaelmas* and *Lady Day*, or within thirteen weeks of any of the said feasts. After *Michaelmas*, and before the thirteen weeks past, the tenant for life died; and his executors brought an action of debt for the rent. It was adjudged, that the action did not lie; for, the rent being to be paid at *Michaelmas* or thirteen weeks after, the lessee had his election to pay it at any of the days; and before the last day it was not due: and, when the lessor died before that day, his executor had no right to the rent; but, after the death of the lessor, having only an estate for life, the rent was gone. If the lessor had had a fee-simple in the land, and had died before the last day, the heir would have had the rent, as incident to the reversion. If the rent had been reserved at *Michaelmas*; and if it was behind for thirteen weeks, then that it should be lawful for the lessor to re-enter; if the lessor survived *Michaelmas*, his executor would have had an action of debt for the

Glover v.
Archer,
4 Leon. 247.

rent; because the rent was then due: and the thirteen weeks were but a dispensation of the entry of the lessor until that time.

Barwick
v. Foster,
Cro. Jac. 233.
§ 10.

§ 63. But where a lease ends at *Michaelmas*, and the rent is payable on that day or within ten days after, the last payment is due at *Michaelmas*, without any regard to the ten days; the rent being due for the last year, although the year expired before the ten days. For, the reservation being annually during the term at the said feasts, or within ten days, it should be expounded according to the contract at the end of every ten days during the contract: but, the term ending at *Michaelmas* so as there could not be ten days after, the law will reject the ten days after the last feast, for that cannot be; and then it was due at the feast according to the contract of the parties.

Biggin
Bridge,
3 Keb. 534.
3 Leon. 211.

§ 64. Where a lease was made of tithes from *February* 1661 to *Michaelmas* 1668, reserving rent at *Lady Day* and *Michaelmas*, or within twenty days after each feast, during the term; and an action was brought for the rent which became due on *Michaelmas Day* 1668, to which the defendant demurred, because the last *Michaelmas Day* was not within the term. It was held by *Twisden*, that in contracts the intent is sufficient; and that *Michaelmas Day* must here be taken to be inclusive.

When Rent
goes to the
Executor or
to the Heir.

§ 65. Where the person entitled to a rent outlives the day on which it becomes due, it will go to his executor or administrator, as part of his personal estate.

But,

But, if the lessor dies on the day preceding the day of payment, the rent will go to the heir, as incident to the reversion.

§ 66. Although rent must be demanded at sun-set of the day on which it is payable, if the lessor intends to take advantage of a condition, yet rent is not due until the last minute of the natural day. And, in the case of leases made by tenants in fee, or under a power, if the lessor dies on the day of payment but before midnight, the rent will go along with the land to the heir or the person in remainder or reversion; because the lessee has till the last instant to pay his rent; and, consequently, the lessor dying before it was completely due, his personal representatives can make no title to it.

1 Saun. 287.
n. 11.

§ 67. But, where a lease is made by a bare tenant for life, which determines at his death, there, if the person entitled to the rent lives to the beginning of the day on which it is payable, it will vest in his executor or administrator.

§ 68. A term of 500 years was created for securing an annuity or rent-charge of 200 *l. per annum* to Lady Cole for her life. Lady Cole died on *Michaelmas Day*, on which day the rent was payable at nine o'clock at night. The question was, whether the term was void without payment of this quarter's rent; or, whether this quarter's rent remained due to Lady Cole, so as to entitle her administrator thereto.

Southern v.
Bellasis, cited
1 P. Wms. 179.

Mr. Justice *Tracy* was of opinion, that this money was due, when by law it ought to be paid : and, therefore, since Lady *Cole* lived beyond sun-set, which was the time when the money was demandable, and to be paid by tenant upon pain of forfeiting his lease, he thought the money was due to her, and ought to be paid to her ; and that her administrator was entitled to the same.

Mr. *Peere Williams* says, Mr. Justice *Tracy* told him, that he advised with Lord Chief Justice *Holt* at his chambers ; and that, upon view of the several authorities relating to this point, his Lordship was of the same opinion.

Strafford v.
Wentworth,
Rec. in Chan.
555. 1 P. W.
180.

§ 69. Sir *Henry Johnson* was tenant for life, with remainder to Lady *Wentworth* : Sir *Henry Johnson* made leases for years, reserving the rent at *Lady Day* and *Michaelmas* ; and died on *Michaelmas Day*, about 12 o'clock at noon. The question was, whether these rents belonged to the executor of Sir *Henry Johnson*, or to Lady *Wentworth* ; or, whether the tenants should retain them.

Lord *Macclesfield* decreed, that, as to those leases which determined on the death of Sir *Henry Johnson*, the rents belonged to his executors ; because, though for the benefit of the tenants, they had till the last instant of *Michaelmas Day* to pay the rents, yet, the reservation being on *Michaelmas Day*, as soon as either of those days began, they were at their peril to take
care

care that they were paid accordingly. But, as to the leases made by virtue of a power, they still had existence : and, therefore, the tenants had till the last instant of those days to pay the rents ; and then, when the lessor died before, the rent goes along with the reversion to the person who is entitled to it.

§ 70. Sir *James Oxenden*, before marriage, settled an estate upon his Lady, the plaintiff, for her life, with a power to himself to make leases. Sir *James Oxenden* made leases pursuant to this power, reserving the rent at *Lady Day* and *Michaelmas*, and died upon *Michaelmas Day* between 3 and 4 o'clock in the afternoon, and before sun-set. One of the lessees paid his rent to Sir *James Oxenden* in the morning of the said *Michaelmas Day*, but the other tenants had not paid the rent. The question was, whether the rents, which were not paid, belonged to the executors of Sir *James*, or to the jointress.

Ld. Rockingham v. Penrice, 1 P. W. 178.

It was decreed by the Master of the Rolls, that, the lessor dying before sun-set, and there being no remedy for the lessor to recover this rent during his life, it should go to the jointress : and that the executors of Sir *James Oxenden* should also pay the rent, which he received on the day of his death, to the jointress ; though, as to this last point, there is a quere by the reporter.

§ 71. Where a rent-service was in arrear, the common law gave the person in reversion a right to enter

Of Distress for Rent.

on

on the lands, and to seize the cattle and other personal chattels found there, and sell them for the payment of the rent, which is called a *distress*.

32 Hen. 8.
c. 37.
8 Ann c. 14.
4 Geo. 2. c. 28.

§ 72. By several modern statutes, this remedy is extended to the proprietors of rent-charges, and to what were formerly called *rents seck*, and to their executors or administrators, even after the determination of the leases, upon which rents are reserved.

Condition of
Re-entry,
Lit. f. 327.

§ 73. It was formerly usual, where a feoffment was made reserving rent, to insert a condition in the deed, that, if the rent was behind, it should be lawful for the feoffor or his heirs to re-enter and hold the lands, until he was satisfied for the rent in arrear. This was held not to be a condition, absolutely to defeat the estate; but the feoffor, on his entry, should only hold the land as a pledge, until he was paid the rent; and the profits should not go in discharge or on account of the rent, but should be applied to his own use.

1 Inst. 203 a.

§ 74. But Lord *Coke* observes, that, if the words of the condition were, that the feoffor should re-enter and take the profits, until thereof he was satisfied, there the profits should be accounted as parcel of the satisfaction.

1 Inst. 203 a.
a. 3.

§ 75. The distinction, when the profits taken by the lessor after entry are, and when they are not to be in satisfaction of the rent, is not admitted in equity.

For,

For, the Court of Chancery will always make the lessor account to the lessee for the profits of the estate, during the time of his being in possession; and will decree him, after he has satisfied the rent in arrear, and the costs attending his entry and detention of the lands, to give up the possession to the lessee, and to pay him the surplus profits of the estate.

§ 76. In grants of rent-charges, a clause of entry on the lands, out of which the rent-charge issues, is usually inserted; in consequence of which, an interest vests in the grantee, whenever the rent-charge is in arrear, which he may reduce into possession by an ejectment; but the possession, thus acquired, is only till the grantee of the rent-charge is satisfied his arrears out of the rents and profits of the land.

Clause of
Entry.
Jemmott v.
Cowley,
1 Lev. 170.
T. Raym. 135.
158.

§ 77. In case of a distress, no demand of rent is necessary; but, where the remedy for the recovery of rent is by way of entry, there must be an actual demand made previous to the entry, otherwise it is tortious; because a condition or power of entry is in derogation of the grant: and, the estate at law being once defeated, it is not to be restored by any subsequent payment. It is therefore presumed, that the tenant is residing on the premises in order to pay the rent, for the preservation of the estate; unless the contrary appears, by the feoffor's being there to demand it. Therefore, unless there be a demand made, and the tenant thereby, contrary to the presumption, appears not to be on the land, ready to pay the rent, the

Gillb. 73.

law

law will not give the lessor the benefit of re-entry, to defeat the tenant's estate, without a wilful default in him; which cannot appear, unless a demand is actually made on the land.

Right of
Entry by
Way of Use.

Tit. 24.
Gillb. Rent,
137.

Haverhill v.
Hare,
Cro. Jac. 510.

Vide Tit. 11.
f.

§ 78. In limitations of rent-charges, a power of entry is usually given by the operation of the statute of uses: as, if lands are conveyed to *A.* and his heirs, to the use, intent, and purpose, that *B.* may receive out of the lands so conveyed a certain annual sum or yearly rent-charge: and to this further use, intent, and purpose, that if such rent-charge be in arrear for a certain time, it shall be lawful for *B.* and his assigns, to enter upon and hold the land, and receive the profits thereof, until the arrears of the rent-charge are satisfied: here, as soon as the rent is in arrear, an use derived out of the feisin of the trustee or releasee to uses springs up, and vests in the person to whom the power of entry is given. This use is immediately transferred into possession, by the operation of the statute 27 *Hen.* 8. He has, consequently, a right to take and keep that possession, until the purpose for which it is executed is satisfied, and then the use determines. By virtue of this estate, he may make a lease for years to try his title in ejectment, either to obtain possession of the lands if it be withheld from him, or to restore it, if it be disturbed or divested: and, if he assigns over the rent-charge, this right of entry and perception of the rents and profits of the lands, charged with the payment of it, will pass the assignee.

§ 79. By the statute 4 Geo. 2. c. 28. s. 2., it is enacted, that every landlord, who by his lease hath a right of re-entry in case of non-payment of rent, when half a year's rent is due, and no sufficient distress is to be had, may serve a declaration in ejectment on his tenant, and affix the same on some notorious part of the premises, which shall be valid without any formal re-entry or previous demand of rent : and a recovery in such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered within six calendar months after.

Ejectment,
Vide 1 Saund.
Rep. 287 a.

By the fourth section of this statute, it is provided, that, if the tenant, at any time before the trial in ejectment, pays or tenders to the lessor or landlord the whole rent in arrear with the costs, or pays such arrears and costs into the court, the proceedings in ejectment shall cease and be discontinued.

1 Burr. 626.
7 Term Rep.
117.

1 Inst. 202 a.
n. 3.

§ 80. As it is a maxim of equity, that a right shall not be without a remedy, the Court of Chancery will, in some cases, give its assistance, to persons entitled to a rent. But equity will not grant a remedy for rent, where there is one at law, nor change the nature of the rent, so as to make the person liable, unless there is fraud in preventing the distress.

Courts of
Equity,
Treat. of Eq.
B. 1. c. 3. s. 3.

§ 81. Where, by great length of time, it is become impossible to know out of what particular lands antient quit-rents are issuable, the Court of Chancery has exercised a jurisdiction ; and has constantly, on proof of payment

Bridges v.
Edwards,
6 Bro. Parl.
Ca. 368.

payment within a reasonable time, decreed a satisfaction for all arrears of such rents, and payment thereof for the future.

**Actions of
Debt and
Covenant.**

§ 82. There are also many cases, in which an action of debt may be brought for rent : and, in all modern leases, wherein rent is reserved, a covenant is inserted, on the part of the lessee, to pay the rent, on which an action of covenant may be brought.

TITLE XXVIII.

RENTS.

CHAP. II.

Of the Incidents to Rents.

- | | |
|---|--|
| <p>§ 1. <i>An Estate in Fee and in Tail may be had in a Rent.</i></p> <p>5. <i>And an Estate for Life or Years.</i></p> <p>6. <i>Occupancy of a Rent.</i></p> <p>11. <i>Curtesy.</i></p> <p>14. <i>Dower.</i></p> | <p>§ 20. <i>Within the Statute of Uses.</i></p> <p>27. <i>May be granted in Remainder.</i></p> <p>30. <i>May commence in futuro.</i></p> <p>32. <i>May cease for a Time.</i></p> <p>33. <i>A Rent cannot be devested.</i></p> <p>36. <i>How a Rent may be forfeited.</i></p> |
|---|--|

Section 1.

WITH respect to the several incidents to rents, the first is, that a person may have an estate in fee simple in a rent-service, and also in a rent-charge.

An Estate in Fee and in Tail may be had in a Rent.

§ 2. A rent being an incorporeal hereditament issuing out of land, is comprehended within the statute *De Donis Conditionalibus*, and may therefore be intailed.

Tit. 2, c. 1. f. 22.

§ 3. There is, however, a very material distinction between a rent limited to a person and the heirs of his body, and an estate in land limited in the same manner: for the tenant in tail of the land may, by a common recovery, bar the intail, and acquire an estate in fee-simple therein; whereas the tenant in tail

*2 Lutw. 1225.
3 P. Wms.
230.*

of

of a rent charge can only acquire a base fee by a recovery, which will determine on failure of issue of his body. This doctrine arises from the principle, that, a rent-charge being against common right, the law will not allow the grantee, by any act of his, to give it a longer duration or existence than that, which was given to it by its original creation.

Smith v.
Farnaby,
Sid. 285.
Anon. 12.
Mod. 513.

§ 4. But, where a rent-charge was granted to *A.* and the heirs of his body, remainder to *B.* and his heirs; it was held that a recovery by *A.* would convert his estate tail into a fee simple; because the donor or grantor of the rent-charge had created a fee therein, and therefore the duration of the rent-charge was not enlarged.

And an Estate
for Life or
Years.

§ 5. A rent-charge may be limited to a person for his own life or that of any other person, or for any number of lives: in which case the grantee will be tenant for life or *pur autre vie* of such rent. A rent-charge may also be limited to a person for any number of years.

Occupancy
of Rent.
Salter v.
Boteler,
cited Vaugh.
199.
1 Salk. 189.

§ 6. By the common law, there could be no general occupant of a rent: for, where a rent was granted to *A.* during the life of *B.* and *A.* died, living *B.*, the rent determined. For, the grant being originally made to *A.* only, when he died, no one could claim it as occupant; because there could be no entry upon it: nor could any one claim it under the deed, because no one was party to it but the grantee. It fol-
lowed,

lowed, therefore, that, as no one could take it under the grant, it ceased and determined.

§ 7. There might, however, have been a special occupant of a rent: as, if a rent was granted to *A.* and his heirs during the life of *B.*, and *A.* died, living *B.* and leaving an heir, such heir would have been a special occupant of the rent.

Vaugh. 201.
1 Inst. 388 a.

§ 8. If a man had granted a rent to *A.* his executors, administrators, and assigns, during the life of *B.* it is said to have been agreed by the court, that the executor of the grantee should not be a special occupant; because it was a freehold, which could not descend to the executor. Mr. *Cox*, in his valuable notes to *Peere Williams*, has observed, that there seems to have been no sound reason for this distinction: and this observation must be allowed to be perfectly just, when it is observed that, where lands were demised to *J. S.* his executors, administrators, and assigns, during the life of *B.* the executors were held to be special occupants. And, if freehold lands are allowed to vest in executors, as special occupants; there can be no reason why a freehold rent should not vest in them also.

Buller v.
Cheverton,
2 Roll. Ab.
152.

3 P. Wms.
264.

Tit. 3. f. 93.

§ 9. In consequence of the statute of frauds, an estate *pur autre vie* in a rent is now deviseable; and, if not devised, is affets in the hands of the heir, if he takes it as special occupant; and, where there is no special occupant, it shall vest in the executors or administrators of those, who had it, and shall be affets in

Tit. 3. f. 94.

their hands, and, if not devised, be considered as personal estate.

Tit. 3. f. 94.
3 P. Wins.
264. note D.

§ 10. It is said by Mr. *Cox* to have been laid down by Lord Keeper *Harcourt*, that if, since the statute of frauds, a rent be granted to *A.* for the life of *B.* and *A.* die, living *B.*, *A.*'s executors or administrators shall have it during the life of *B.* For the statute is not only made, to prevent the inconvenience of scrambling for estates, and getting the first possession, after the death of the grantee; but likewise for preserving and continuing the estate, during the life of the *cestui que vie*; that though, by his dying without having made any such disposition, in nicety of law, this estate would have determined; yet by the statute that interest, which passed from the grantor, ought to be preserved, and should go to the executors or administrators of the grantee, during the life of the *cestui que vie*: and the statute, in this case, did not enlarge, but only preserve, the estate of the grantee.

Curtsey.

§ 11. A person may be tenant by curtesy of a rent, as well as of land: and a feisin in law will be sufficient for this purpose; because, in many cases, it may be impossible for the husband to acquire any other feisin.

1 Inst. 29 a.
1 Rep. 97 b.

Dettrick v.
Bradburn,
1 Sid. 119.
117.

§ 12. A rent-charge was granted to a woman and her heirs, payable at two feasts in the year; the first payment to be made at such of the said feast days, as should happen after the death of *J. S.* The woman married, had issue, and died; and the question was,

whether

whether the husband should be tenant by the curtesy of this rent. No judgment appears to have been given; but *Glynn*, Chief Justice, thought the husband was entitled to curtesy; for, although the rent was to commence *in futuro*, yet it was grantable over presently, which proved it to be *in esse*; so that the wife might be said *habere hereditatem*, and the seisin was not material, it being the case of a rent.

§ 13. It is said by Lord *Coke*, that, if a woman make a gift in tail, and reserve a rent to her and her heirs, and the donor taketh husband and hath issue, and the donee dieth without issue, the wife dieth, the husband shall not be tenant by the curtesy of the rent: for that the rent newly reserved is by the act of God determined, and no state thereof remaineth. But, if a man be seised in fee of a rent, and maketh a gift in tail general to a woman; she taketh husband, and hath issue; the issue dieth; the wife dieth; without issue; he shall be tenant by the curtesy of the rent, because the rent remaineth.

1 Inst. 30 a.
Vide Tit. 5.
ch. 2. s. 10.

Mr. *Hargrave* has added to this passage the following note from Lord *Hale's* manuscripts.—“So, if it was
“ a rent *de novo* granted in tail, and the wife dies
“ without issue, the husband shall be tenant by the
“ curtesy.”

§ 14. A rent-service is subject to dower; so that if a husband make a lease for years; either before or after the coverture, reserving a rent, and dies; his widow will be endowed of a third part of the rever-

Dower.
1 Inst. 32 a.

Idem.
note 4.

sion, together with a third part of the rent. So, if the husband make a gift in tail, reserving rent; as such rent is payable out of an estate of inheritance, the wife will be endowed of a third part of it, as long as it continues. But, if a husband, before marriage, makes a lease for life, reserving rent to him and his heirs, and dies; his widow will not be endowed of this rent, because her husband had not an estate of inheritance therein.

Idem.

§ 15. A rent-charge in fee or in tail is also subject to dower; but an annuity, which is only a personal inheritance, is not subject to dower. And, if a rent-charge be granted to a man and his heirs, who dies, and his widow brings a writ of dower against the heir; who answers that he claims the same as an annuity, and not as a rent-charge, yet the widow shall recover dower out of it: for the heir cannot determine his election by claim, but by suing a writ of annuity.

1 Inft. 144 b.

Perk. 373.

§ 16. If the heir had brought a writ of annuity, and had obtained judgment, before the wife's claim of dower, she could not recover; because it was then become an annuity.

Chaplin v.
Chaplin,
3 P. Wms.
229.

§ 17. Where a rent *de novo* is granted to a man and the heirs of his body, and the grantee dies without issue, his widow will not be endowed of it: for, the rent being determined by the death of the husband without issue, the widow cannot be endowed of that which is not in being; though it is otherwise, where the tenant in tail of land marries and dies without issue,

issue, whereby the estate tail is determined: for, in that case, the wife shall be endowed notwithstanding, because the land is in being, though the estate tail is determined; and the dower is in some respects a continuance of the estate.

Tit. 6. ch. 3.
f. 5.

§ 18. It is, however, said by Lord *Talbot* in the same case, that, if a rent *in esse* be granted to *A.* in tail, remainder to *B.* in fee, and *A.* marries and dies without issue, his wife shall be endowed; or, if a rent *de novo* be granted to *A.* in tail, remainder to *B.* in fee, and *A.* marries and dies without issue, his wife shall be endowed: for the estate tail in the rent shall be allowed to continue as against the remainder-man.

§ 19. A woman will not, however, be entitled to dower of a rent; unless her husband had the legal estate in such rent.

Chaplin v.
Chaplin,
infra.

§ 20. Rents are expressly mentioned in the statute 27 *Hen.* 8. c. 10. of uses, and may therefore be conveyed to a use, which will be executed by the statute.

Within the
Statute of
Uses.

§ 21. The statute also provides for the creation of rents *de novo*; by which it is enacted, that where any person or persons stand seised of any lands to the use and intent that some other person shall receive a rent out of the same lands, in every such case the person, having such use and interest to have the same rent, shall be adjudged and deemed to be in possession and seisin of the same rent of and in such like estate as he had in the use of the said rent.

§ 22. Lord *Bacon*, in his reading on this statute, observes that in consequence of the words, “whereas “divers persons are seised,” a doubt arose whether the statute was not confined to rents in use at the time; but that this was explained in the following words, “were or should be seised.”

§ 23. The statute of uses not only transfers a rent, but also all remedies and rights given for the recovery thereof, as being incident thereto; but does not transfer collateral rights.

Cook v. Herle,
2 Mod. 138.

§ 24. *Thomas Cook* granted a rent-charge of 200*l.* per annum to trustees, in trust for *Mary Cook*; to hold to them, their heirs, executors, administrators, and assigns, in trust for the said *Mary* for life; with a clause of distress, and a covenant to pay the rent-charge to the trustees for the use of the wife.

The court were of opinion, that this rent-charge was executed by the statute of uses, by the express words thereof, which execute such rents granted for life, upon trust; and transfers all rights and remedies incident thereunto, together with the possession, to the *cestui que use*: so that though the power of distraining was limited to trustees by the deed, yet by the statute, which transferred that power to *Mary Cook*, she might distrain also; but the covenant, being collateral, could not be transferred.

§ 25. The operation of the statute of uses is the same in the case of rents, as in that of lands: for it
only

only transfers the legal estate in the rent to the first *cestui que use*. And, therefore, a conveyance to *A.* and his heirs, to the use and intent that *B.* and his heirs may receive a rent out of the estate, gives *B.* the legal fee of the rent; so that, if it is afterwards declared that *B.* and his heirs are to stand seised of the rent to uses, the intended *cestuis que use* take only trust or equitable estates.

Vide Tit. 12.
ch. 1. f. 4.

§ 26. Lady *Hanby* conveyed divers lands, to the use and intent that certain trustees, in the deed named, should receive and enjoy a rent-charge of 30*l.* *per annum* to them and their heirs; and then the said rent was to be to the use of *Porter Chaplin* in tail male, remainder over. *Porter Chaplin* died, leaving issue Sir *John Chaplin*; who married the plaintiff, and died without issue.

Chaplin v.
Chaplin,
3 P. Wms.
229.

One of the questions was, whether Lady *Chaplin* was dowable of this rent.

Lord Chancellor *Talbot* was of opinion, that Sir *John Chaplin*, having only a trust estate in this rent, his widow was not dowable of it.

§ 27. A rent may be granted in remainder, after a limitation of it to a person for life: and, if a rent were granted to *A.* for the life of *B.* remainder over, though *A.* should die in the life-time of *B.* so that the particular estate determined in interest as to the perception of the profits; yet, inasmuch as the terre-

May be
granted in
Remainder.

Salter v.
Butler,
Yelv. 9, 10

tenant during this time held the land discharged, it was sufficient to support the remainder.

Cont. Rem.
452.

Ante, f. 9.

§ 28. Mr. *Fearne* doubts, whether this holding of the land discharged would have supported a contingent remainder; but says, that at this day there can be no room for a question of that nature: for, since the statutes 29 *Cha.* 2. c. 3. and 14 *Geo.* 3. c. 20., the rent is holden to continue in the representatives of the grantee, dying in the life-time of the *cestui que vie*,

Weeks v.
Peach,
Salk. 577.

§ 29. A grant of a rent to *A.* and the heirs of his body, remainder to *B.* and his heirs, has been held good. For, though it was objected, that there could be no remainder of that whereof there was no reversion; yet it was held by Lord *Holt*, that there may be a remainder of a rent *de novo*: for the intent of the party gives it first a being for the whole, and then the lesser estates are carved out of it.

May commence in futuro,
Plowd. 156.
Gilb. 59.

§ 30. A rent *de novo* may be granted, so as to commence in futuro: for this is not like the case of lands, where the livery must carry the freehold immediately; and where the abeyance, for want of distinguishing in whom the freehold is, may be of prejudice to the rights of others. But the grant of a rent *de novo* is not attended with the like inconvenience: for no man can have a precedent right to a thing, which is created by the grant itself.

§ 31. A rent *in esse*, or already created, cannot however be granted to commence *in futuro*, because to such a rent there may be a precedent title; and, therefore, such a grant is not good: for such freeholds, by being thus split and severed, do hide the person in whom the right is; and, therefore, the party, that has right, will not be able to discern against whom to bring his *præcipe* for the recovery of it. Gilb. 60.

§ 32. A rent *de novo* may be limited, so as to cease for a time, and afterwards to revive. May cease for a time.

Thus, where a rent *de novo* was granted, to a man and his heirs, with a proviso that, if the grantee died, his heir being within age, then the rent should cease during his minority; and the grantee died leaving his heir within age, the wife of the grantee brought a writ of dower against the terre-tenant. And it was held in parliament, that the demandant should have execution against the heir, when he came of full age. Fitz. Dower, pl. 143.
Jenk. Cent. 1. Ca. 6.

§ 33. Where a person is once seised or possessed of a rent he cannot afterwards be disseised or dispossessed thereof: because a rent, being merely a contingent right, collateral to, though issuing out of, lands; it cannot be divested. For, although a person, who has a rent, be not in the actual receipt and enjoyment of it, yet by *non-user* only he does not cease to have a vested estate or interest therein, so that he still continues to be in possession: for, a rent being a mere creature A Rent cannot be divested.
5 Rep. 124 a.

Hawk. P. C. creature of the law, it is always considered to be in
Ch. 64. f. 45. the possession of him, whom the law adjudges to have
a right to such possession.

§ 34. It should, however, be observed, that a rent
may be divested by a disseisin: and the different
modes, by which a man might be disseised of a rent,
Sec. 237. 240. are stated by *Littleton*; because, when he wrote, an
assise was in most cases the only remedy for the reco-
very of a rent; and it only lay, where the party was
disseised. But disseisins of incorporeal hereditaments
are only at the election and choice of the party in-
jured; who, for the sake of more easily trying the
right, is pleased to suppose himself disseised: for, as
there can be no actual dispossession, he cannot be
compulsively disseised of any incorporeal heredita-
ment.
10 Rep. 97 a.
3 Comm. 170.

§ 35. The doctrine, that a rent cannot be divested,
extends even to the case, where rent is paid to a
person, who has no title to it: for it is said by Lord
Chief Baron *Gilbert*, that if *A.* is seised of a rent-
charge, and the tenant of the land pays it to another,
Ten. 104. this does not divest *A.* of his right; because the
wrongful payment of *A.*'s tenant cannot alter his
right: it is therefore a payment in his own wrong,
and it still remains in arrear to *A.* This seems the
strongest case that can be put upon the subject.

How a Rent
may be for-
feited,
1 Inst. 251 b. § 36. Lord *Coke* says, that a particular estate of
any thing, that lies in grant, cannot be forfeited by
any

any grant in fee, by deed : as, if tenant for life or years of a rent, grants the same by deed, this is no forfeiture of his estate ; for nothing passes thereby, but that, which lawfully may pass.

§ 37. But a particular estate in a rent, or in any other incorporeal hereditament, may be forfeited by matter of record ; of which an account will be given in a subsequent title.

Tit. 35.
File.

TITLE XXVIII.

R E N T S.

CHAP. III.

Of the Discharge and Apportionment of Rents.§ 1. *Discharge of Rent-Service.*13. *Discharge of Rent-Charge.*21. *Apportionment of a Rent-Charge.*§ 27. *Apportionment of Rent-Service.*41. *Statute 11 Geo. 2. for apportioning of Rent.*

Section 1.

Discharge of
Rent-service.

A RENT-SERVICE being something given by way of retribution to the lessor, for the use and occupation of the land demised; the lessor's title to the rent is founded upon the principle, that the land demised is enjoyed by the tenant. But if the tenant be by any means deprived of the land demised, his obligation to pay the rent ceases; as it would be unjust, that he should be obliged to make a return for that which he does not enjoy.

2 Roll. Ab.
489.
Gilb. 145.

§ 2. From this principle it follows, that if the tenant be evicted from the lands demised to him, he will thereby be discharged from payment of the rent; but, in cases of this kind, the tenant is liable to the payment of the rent, which became due before the eviction; because the obligation continues as long as the consideration.

§ 3. If

§ 3. If the tenant be evicted by a title paramount, *Idem.* before the day appointed for the payment of the rent, such eviction will discharge the tenant from payment of any part of the rent.

§ 4. As the tenant is discharged from the payment of the rent, when the land is evicted by a title paramount; so, by a parity of reason, he shall be discharged from it, when the lord purchases the tenancy: for, in such case, the lord cannot have both the land and the rent; nor shall the tenant be under any obligation to pay rent, when the land, which was the consideration is resumed by the lord into his own hands. And this resumption, or purchase of the tenancy by the lord, makes what the law books call an extinguishment of the rent. *Gilb. 149.*

§ 5. If the conveyance of the land be not absolute, *Gilb. 150.* but upon condition; or, if it were only of a particular estate of shorter duration, than the estate which the lord had in the rent-service; in these cases, though there be an union of the tenancy and of the rent in the same hand, yet as that union is only temporary; (for upon the performance of the condition, or determination of the particular estate, the tenant will be restored to the enjoyment of the land by virtue of the donation; and consequently the obligation to pay the rent will revive:) therefore the rent is in such case only suspended, not extinguished.

§ 6. Where a person who has a rent-service, purchases part of the land out of which the rent issues, *Gilb. 152.*
the

Lit. f. 222.

the whole of the rent-service is not thereby discharged, but only a part, proportioned to the quantity of land purchased; because, in the case of a rent-service, the tenant is under the obligation of fealty to perform to his lord the services, due for the land which he holds of him: and this obligation continues, while any part of the land is held by the tenant; for, otherwise the remaining part of the lands would be held of nobody, and freed from all feudal services; which would formerly have been a detriment to the public. And, as the tenure between the lord and tenant continued for so much of the land as remained unpurchased, the tenant was by his oath of fealty obliged to perform the services; but, as the lord had resumed part of the land, the services were diminished in proportion to the quantity of land resumed.

Dyer, 33 a.

§ 7. Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and has no remedy over, there the law will excuse. This is the principle, upon which the tenant has been held in the preceding cases to be discharged from the payment of rent. But when the party by his own contract creates a charge or duty on himself, he is bound to make it good, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract.

Paradise
v. Jane,
Allen, 26.

§ 8. In consequence of this doctrine, it was resolved that a lessee for years was bound to pay his rent, though an army had entered upon the lands, and kept him out, so that he could not enjoy them;
for

for the rent was a duty created by the reservation; and, had there been a covenant to pay it, there had been no question but the lessee must have made it good, notwithstanding the interruption by enemies: for the law would not protect him beyond his own agreement; and, the reservation being a covenant in law, it was the same as if there had been an actual covenant.

Another reason was added; that, as the lessee was to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the burden of them upon his lessor.

§ 9. It has been resolved that, if the lessee of a house covenants to pay the rent during the term, he is compellable to pay it though the house is burnt down, and the landlord is bound to rebuild it. And this doctrine has been fully confirmed in a modern case.

Monk v.
Cooper,
2 Ld. Raym.
1477.

§ 10. In a lease of a house and warehouse at *Wapping*, the lessee covenanted to pay the rent and keep the premises in repair, casualties by fire only and always excepted. The house was burnt down by accident, and the lessor brought an action of covenant for the rent. The lessee pleaded that the house was burnt down by accident. Upon demurrer the court was of opinion that the point had been determined in the cases of *Paradise v. Jane*, and *Monk v. Cooper*. And Mr. Justice *Buller* read a note of the case of *Pindar v. Rutter*, at the sittings at *Westminster* after *Mich.*

Belfour v.
Weston,
1 Term R.
310.

Ante.

Mich. 1767. That was an ejectment by the tenant against his landlord, to recover the possession of some houses which had been burnt down during the term, and had been rebuilt by the landlord. In the lease there was an express covenant on the part of the tenant to pay rent, but he had paid none subsequent to the fire. Lord *Mansfield*, before whom the cause was tried, said, the consequence of the house being burnt down was, that the landlord was not obliged to re-build, but the tenant was obliged to pay the rent during the whole term. The premises consisted of houses only, and the fire had made them quite useless. In March 1793 the premises were worth nothing; but the landlord if he had insisted on the rigor of the law, might have obliged the plaintiff to pay rent for nothing during the remainder of the term; and then the plaintiff would have been glad to have delivered up the premises. Therefore he left it to the jury to consider whether it was not to be presumed that the tenant had abandoned the lease at the time of the fire; and accordingly the defendant had a verdict.

§ 11. This doctrine does not appear to have been supported by the Court of Chancery, for in a case of this kind which arose in 1764, but which went off upon another ground, Lord *Northington* said,—“ The
 “ justice of the case is so clear that a man should not
 “ pay rent for what he cannot enjoy, and that occa-
 “ sioned by an accident which he did not undertake
 “ to stand to, that I am much surprised it should be
 “ looked upon as so clear a thing that there should be
 “ no defence to such an action at law; and that such
 “ a case

“ a case as this should not be considered as much an
 “ eviction, as if it had been an eviction by title: for
 “ the destruction of the house is the destruction of
 “ the thing. Though this covenant does not extend
 “ to oblige the defendant to re-build, yet when an
 “ action is brought for rent, after the house is burned
 “ down, there is a good ground of equity for an in-
 “ junction, till the house is re-built.”

§ 12. In a subsequent case of this nature Lord Chancellor *Apsley* is reported to have decided, that though the landlord was not bound to re-build, yet the tenant was neither obliged to re-build, nor to pay rent, till the premises were re-built.

Steele v.
Wright.
 Cited 1 Term
 Rep. 708.
 Treat. of Eq.
 B. 1. c. 5. f. 8.

§ 13. With respect to the discharge of a rent-charge, it is laid down by *Littleton*, § 222. that, if a man hath a rent-charge to him and his heirs, issuing out of certain land, if he purchase any parcel of this to him and to his heirs, all the rent-charge is extinct.

Discharge of
 Rent-charge.

§ 14. Lord *Coke* says, the reason of this extinguishment is, because the rent is entire and against common right, and issuing out of every part of the land; and therefore, by purchase of part, it is extinct in the whole.

1 Inst. 147 b.

§ 15. Lord Chief Baron *Gilbert* observes, that the reason of the difference between this case, and that of the purchase of part of the lands, out of which a rent-service issues, is, because, in the case of a rent-charge, there is no connexion of tenure between the

Rents, 152.

grantor and grantee, as there is in the case of a rent-service. And, as grants of rent-charges were of no benefit to the public, and afforded no additional strength or protection to the kingdom, the law carried them into execution only so far as they could take effect according to their original intention; and, therefore, where the grantee by his own act prevented the operation of the grant, according to its original intention, the whole grant determined.

Idem.

§ 16. Lord *Coke* also says, that, if the grantee of a rent-charge purchases parcel of the land, and the grantor by his deed, reciting the said purchase of part, granteth that he may distrain for the same rent in the residue of the land, this amounteth to a new grant,

2 Roll. Ab.
414.

§ 17. If a person have a rent-charge, issuing out of twenty acres of land, and he releases all his right in one acre, this will extinguish the whole rent-charge.

§ 18. It frequently happens in practice, that a person entitled to a rent-charge is disposed to exonerate part of the lands from the payment of it; but, in consequence of the above doctrine, difficulties have arisen in settling the mode of effecting such exoneration, without risking the entire extinguishment of the rent-charge. The common mode has been, for the grantee of the rent-charge to join in the conveyance of the lands; which operates as a release of the lands conveyed from payment of the rent-charge, and to insert a proviso in the deed, that the other lands shall
continue

continue subject to the rent-charge: and it is held upon the authority of Lord Coke, that this proviso will operate as a new grant of the rent-charge.

To this mode there is a material objection: for such new grant would be subject to any incumbrances, created subsequently to the grant of the original rent-charge, but prior to the conveyance of part of the lands.

§ 19. Another mode is sometimes adopted; namely, to obtain a covenant from the grantee of the rent-charge, that he will not distrain or enter upon the premises conveyed, for the recovery of his rent-charge. But there is a case in which one of the judges held, that such a covenant would operate as a release of the whole rent-charge, though *Anderson* was of a different opinion.

Butler v. Monnings,
Noy 5. vid:
Duex v. Jefferies,
Cro. Eliz. 352.

§ 20. It is now a common practice, where a person entitled to a rent-charge is disposed to exonerate a part of the lands charged with it, to have a separate agreement between the proprietor of the rent-charge and the purchaser; by which it is stipulated, that the proprietor of the rent-charge shall execute such a conveyance as shall be deemed necessary for the purpose of discharging the lands purchased from the payment of the rent-charge. Provided, that such conveyance shall not bar the proprietor of the rent from levying it out of the other lands, whereon it is charged; with an agreement, that the proprietor of the rent shall not in the mean time distrain, or enter upon the lands

A a 2

purchased,

purchased, for the purpose of compelling payment of the rent. Such an agreement, not being a deed, cannot be pleaded as a release in a court of law : and, in equity, the purchaser might obtain upon it an injunction, to restrain the proprietor of the rent-charge from claiming it out of the lands purchased.

Apportion-
ment of a
Rent-charge.

§ 21. There are many cases, in which rents may be apportioned, as well by the act of the party, as by act of law.

Gillb. 163.
1 Inst. 148 a.

Thus, where the grantee of a rent-charge releases part of the rent to the tenant, such release will not extinguish the whole rent ; but the part not released will still continue.

Idem.

§ 22. So, if the grantee of a rent-charge conveys part of it to a stranger, and the tenant of the land attorns, such grant will not extinguish the residue, which was not parted with ; because such release or disposition makes no alteration in the original grant ; nor does it defeat the intention of it, as the purchase of part of the land does : for the whole rent is still issuable out of the whole land, and charged according to the original intention of the grant. Besides, since the law allowed of such grants, and thereby established this kind of property, it would have been unreasonable and severe, to hinder the proprietors of rent-charges from dividing them, for the promotion of their children.

§ 23. Lord Chief Baron *Gilbert* observes, that the objection, which has been made against this kind of apportionment of rent-charges, is this;—that the tenant would be thereby exposed to several suits and distresses for a thing, which in its original creation was entire, and recoverable upon one avowry; but the answer is obvious, that it is in the tenant's choice, whether he will submit himself to this inconvenience, by his attornment to the grant of a part of the rent-charge.

Rents, 164.
Cro. Eliz.
742.

§ 24. Since Lord Chief Baron *Gilbert* wrote, the necessity of an attornment is taken away; but still a division or apportionment of a rent-charge, by a conveyance of part of it to a stranger, is held good.

§ 25. A rent-charge may be divided, and apportioned by act in law: for a part of a rent-charge may be extended by a *scire facias*; and, though the tenant is thereby without his attornment made liable to several suits and distresses; yet it is an inconvenience, which he may avoid by a punctual payment of his rent.

Wotton v.
Shirt,
Cro. Eliz. 742.

Gilb. 165.

§ 26. If part of the lands, subject to a rent-charge, descend to the grantee of the rent-charge, it shall be apportioned according to the value of the land: for, in this case, the grantee is perfectly passive, and concurs not by any act of his to defeat the intention of the grant.

Gilb. 156.
Lit. f. 224.

§ 27. With respect to the apportionment of rent-service, it has been stated, that, where a person hav-

Apportion-
ment of Ren
service.

Ante, f. 6.

Gilb. 152,
153. 165.

ing a rent-service purchases part of the land, out of which it issues, the rent-service is not extinguished. But, in such a case, the rent-service shall be apportioned according to the value of the land; so that the purchase shall operate as a discharge to the tenant, for so much of the rent, as is equal to the value of the land purchased.

Gilb. 165.
Lit. f. 222.
1 Inst. 149 a.

§ 28. This rule, however, applies only to such services as are divisible in their nature, such as rent; for, with respect to indivisible services, as where the tenant is bound to render a horse, a hawk, or such like, although the lord purchases part of the tenancy; yet, as there can be no apportionment of these services, they shall become extinct, and the tenant will be discharged from them: for, the whole tenancy being equally chargeable with them, the lord by his own act shall not discharge part, and throw the whole burthen upon the residue, for his own private benefit and advantage.

1 Inst. 149 a.
Gilb. 166.

§ 29. Where such entire service is for the benefit of the public, as castle-guard, cornage, &c. or to repair a bridge or way, or to keep a beacon, or for the advancement of justice, or if it be a work of piety; in all such cases, the tenant is still chargeable for the whole service, because the thing is, in its nature, indivisible; and the whole shall not be extinguished, because the public has an interest in such services, and shall not be prejudiced by the private transactions of the parties.

§ 30. Lord *Coke* says, if there be lord and tenant by fealty and heriot-service, and the lord purchase part of the land, the heriot-service is extinct; because it is entire and valuable. But it is otherwise in the case of heriot-custom.

1 Inst. 149 b.
Talbot's case.
8 Rep. 104.

Tit. 10. c. 4.
f. 50.

§ 31. Where part of the tenancy comes to the lord by descent, the services are not extinct, though indivisible.

Gilb. 167.

§ 32. It was formerly doubted, whether a rent-service, incident to a reversion, might be apportioned by a grant of part of the reversion; or, whether the whole rent should not be extinct and lost: for, since the reversion and rent incident thereto were entire in their creation, it was thought hard that they should be divided by the act of the lessor, and the tenant thereby made liable to several actions and distresses.

Gilb. 172.

§ 33. It has, however, been long settled, that where part of the reversion is granted away, the rent incident to such reversion shall be apportioned: for the rent is incident to the reversion. And, therefore, if a person make a lease for three years of land, reserving three shillings rent, as he may dispose of the whole reversion, so he may also of any part of it, since it is a thing in its nature severable; and the rent, as incident to the reversion, may be also divided; because that, being a retribution for the land, ought to be paid to those who are to have the land upon the expiration of the lease: and hence it is, that the rent or a proportionable part thereof, passes immediately

Gilb. 173.

with the reversion, without any express mention being made of it in the grant.

Ardo v.
Watkins,
Cro. Eliz.
637, 651.

§ 34. A rent-service may be apportioned by a devise of it to several persons; as, where *A.* leased land to *B.* rendering 10*l.* rent, and then devised 6*l.* part of the 10*l.* to *C. D.* and *E.* severally, to each of them a third part; and died. It was resolved, that an action of debt was maintainable by one of the devisees: and it was said, that, although the lessee by this means becomes subject to several distresses and actions, without attornment; yet these are mischiefs, which he brings upon himself, and which he may prevent by a punctual payment of his rent.

Ante, f. .
Lit, f. 222.
1 Inst. 148 b.

§ 35. It has been stated, that a rent-charge is discharged by the eviction of the tenant out of the whole land, from which the rent issues; but, where only part of the land is evicted, the rent shall be apportioned.

Jew v.
Thirkwell,
1 Cha. Ca. 31.

§ 36. The plaintiff was lessee of divers lands, whereupon an entire rent was reserved; afterwards, the inhabitants of the town, where part of the land lay, claimed a right of common in part of the lands so let; and, upon a trial, were found to have right of common there. And, as this was not an eviction of the land at law, because the soil was not recovered, there could be no apportionment of the land, at law; and therefore the bill was, to have the rent apportioned in equity. Mr. Serjeant *Maynard* insisted, that such apportionment had frequently been decreed in equity;

equity ; but, it appearing that the lands were worth the rent reserved, and more ; the court of chancery would not decree an apportionment.

§ 37. With respect to those cases, where a rent-service shall be apportioned by the act of God ; it is said in *Roll's Abridgment* that if a man leases land for life or years rendering rent, and after part of the land is surrounded by fresh water, this will not make any apportionment of the rent, because the soil remains, and it may be regained again. But if part of the land demised be surrounded or covered by the sea, this will make an apportionment of the rent ; for, though the soil remains to the lessee, yet by ordinary intendment there is not any probability of regaining it.

1 Roll. Ab.
236.

§ 38. If land demised be burnt by wild-fire, yet the rent shall not be apportioned ; for the land remains notwithstanding, and cannot be so consumed, but that some benefit may be made thereof.

1 Roll. Ab.
236.

§ 39. A rent-service may also be apportioned by act of law ; as where a moiety of a reversion is extended upon a writ of *elegit*, the rent shall be apportioned, and the lessor shall still enjoy half of it, as incident to the reversion, that remains in him.

Campbell's
case,
1 Roll. Ab.
237.

§ 40. So, where a husband leases for years reserving rent, and dies ; and his widow recovers a third part of the reversion for her dower, she shall have the same proportion of the rent ; for, in all these cases, the

Idem.

the law apportiones the rent in the same manner as it disposes of the reversion.

Stat. 11 Geo.
2. for appor-
tioning of
Rent.
Jenner v.
Morgan,
1 P. Wms.
392.

§ 41. At common law, if a tenant for life died before the day on which the rent became due, where the lease determined by the death of the tenant for life, his executors could not claim an apportionment of the rent: nor could the remainder-man or reversioner claim any part of the rent, which accrued during the life of the tenant for life; so that the tenant paid nothing.

§ 42. This defect in the law produced the statute 11 Geo. 2. c. 19. § 15. by which it is enacted, “ That,
“ where any tenant for life shall die before or on the
“ day on which any rent was reserved or made pay-
“ able upon any demise or lease of lands, tenements,
“ or hereditaments, which determined on the death
“ of such tenant for life, that the executors or admi-
“ nistrators of such tenant for life shall and may, in
“ an action on the case, recover of and from such
“ under-tenant or under-tenants of such lands, tene-
“ ments, or hereditaments, if such tenant for life die
“ on the day on which the same was made payable,
“ the whole, or if before such day then a proportion,
“ of such rent according to the time such tenant for
“ life lived, of the last year or quarter of a year, or
“ other time in which the said rent was growing due
“ as aforesaid; making all just allowances, or a pro-
“ portionable part thereof accordingly.”

§ 43. This

§ 43. This statute only extends to rents, reserved on leases which determine by the death of the lessor: for, where the lease does not determine on that event, the person in remainder or reversion becomes entitled to the whole rent due from the day of payment, preceding the death of the tenant for life; but it has been extended to the executors of a tenant in tail, who died without issue, some days before the rent became due.

§ 44. Tenant in tail, remainder to the defendant in fee, leased for years; and died without issue a week before the day of payment of the half year's rent. The lessee at the day paid all the half year's rent to the defendant: the executor of the tenant in tail brought his bill for an apportionment of the rent. Lord Chancellor *Hardwicke*:—This point has never been determined; but this is so strong a case, that I shall make it a precedent. There are two grounds for relief in equity. The first arises on the statute 11 *Geo.* 2.: the second arises on the tenant's having submitted to pay the rent to the defendant. The relief, arising upon the statute, is either from the strict legal construction, or equity formed upon the reason of it. And here it is proper to consider, what the mischief was before the act, and what remedy is provided at common law. If tenant for life, or any who had a determinate estate, died but a day before the rent, reserved on a lease of his, became due, the rent was lost: for no one was entitled to recover it. His representatives could not, because they could only bring an action for the use and occupation; and that would

Pagett v. Gee,
Burr's Just.
vol. 1. p. 481.
Ambler's Rep.
198.

not

not lie where there was a lease, but debt or covenant : nor could the remainder-man, because it did not accrue in his time. Now, this act appoints apportioning the rents, and gives the remedy. But there are two descriptions of persons, to whose executors the remedy is given : in the preamble it is one, having only an estate for life ; in the enacting part, it is tenant for life. Now, tenant in tail comes expressly within the mischief : I do not know how the judges at common law would construe it ; but I should be inclined in this court to extend to them. I should make no doubt, where this is the case of tenant in tail after possibility of issue extinct : for he is considered in many respects, as tenant for life only. He cannot suffer a recovery : he may be enjoined from committing waste, such as hurts the inheritance, as felling timber ; though not for committing common waste, being considered as to that as tenant in tail. Where it is the case of tenant for years determinable on lives, he certainly must be included within the act ; though it says only tenant for life : it would be playing with the words to say otherwise. These cases shew the necessity of construing this act beyond the words. Tenant in tail has certainly a larger estate than a mere tenant for life : for he has the inheritance in him, and may, when he pleases, turn it into a fee ; but, if he does not, at the instant of his death he has but an interest for life. Such too is the case of a wife, tenant in tail *ex provisione mariti* : upon this point I give no absolute opinion. As to the equity arising from this statute, I know no better rule than this ; *equitas sequitur legem* : where equity finds a rule of law agreeable

to conscience, it pursues the sense of it to analogous cases. If it does so as to the maxims of the common law, why not as to the reasons of the acts of parliament? Nay, it has actually done so on the statute of forcible entry, on which this court grounds bills, not only to remove the force; but also to quit the possession. This court extends the reason to equitable interest; but I ground my opinion, in this case, on the tenant's having submitted to pay the rent. He has held himself bound in conscience, for the use and occupation of the land the last half year: he paid it to the defendant, which he was not bound to do in law. And, in such a case, the person he pays it to shall be accountable, and considered as receiving it for those who are in equity entitled thereto. The division must be that prescribed by the statute; and then the plaintiff is entitled to such a proportion of the rent, as accrued during the testator's life. And accordingly it was so decreed.

§ 45. *Henry Vernon* being tenant in tail of estates in the county of *Suffex* died on the 17th of *March* an infant, by which *John Vernon* one of the plaintiffs became tenant in tail of the estate.

Vernon v. Vernon,
2 Bro. R. 659.

Part of the lands was occupied by persons holding from year to year under the guardian, and their rents were payable at *Lady Day* and *Michaelmas Day* in every year, which demises expired by the death of *Henry Vernon*.

These

These rents having been paid into the hands of the receivers, the question was, whether the administratrix of *Henry Vernon* was entitled to the proportion of the rents from *Michaelmas* to the 17th of *March*, the day of his death, or the remainder-man was entitled to the whole.

The Master reported that a proportion of the rents was due to *Henry Vernon* on the day of his death ; to which the remainder-man took an exception, that he ought to have certified, that no sum was due to *H. Vernon* on the day of his death, in regard, that he was tenant in tail of the estates of which the master certified the said rents or proportions to be due.

Lord Chancellor *Thurlow*.—"The case of *Paget* and *Gee* seems rather to be a decision, what the statute ought to have done, than what it has done : but the question here seems to turn on another ground, that the tenant, holding from year to year, or from period to period, from a guardian without lease or covenant, cannot be allowed to raise an implication in his own favour, that he should hold without paying rent to any body."

The exception to the Master's report was overruled.

TITLE XXIX.

DESCENT.

CHAP. I.

Of the Title to Things real.

CHAP. II.

Of Descent and Consanguinity.

CHAP. III.

Of the Rules or Canons of Descent.

CHAP. IV.

Of the Descent of Estates in Remainder and Reversion.

CHAP. V.

Of Descents by Statute and Custom.

CHAP. I.

Of the Title to Things real.

- § 1. *Definition of a Title.*
3. *Possession.*
4. *Right of Possession.*
2. *Right of Property.*

- § 9. *Discontinuance of an Estate Tail.*
10. *Possession and Right of Possession and Property.*

Section 1.

HAVING treated of the several kinds of real property, both corporeal and incorporeal, and of the estates that may be had therein; it will now be necessary

necessary to consider the title to real property, with the manner in which it may be acquired or lost.

Definition of
a Title,
1 Inst. 345 b.
2 Com. c. 13.

§ 2. A title is thus defined by Lord Coke, *Titulus est justa causa possidendi id quod nostrum est*. Or it is the means whereby the owner of lands hath the just possession of his property. But Sir William Blackstone observes, there are several stages or degrees requisite to form a complete title to lands and tenements.

Possession.

§ 3. The first degree of title is the bare possession, or actual occupation of the estate, without any apparent right, or any pretence of right, to hold and continue such possession. This may happen where one man disseises another; or where, after the death of the ancestor, and before the entry of the heir, a stranger abates, and holds out the heir. In these cases the disseisor or abator has only a mere naked possession, which the rightful owner may put an end to, by an entry on the land; but in the mean time, till some act be done by the rightful owner to divest this possession, and assert his title, such actual possession is *prima facie* evidence of the legal title in the possessor; and it may by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title; and at all events without such actual possession, no title can be completely good,

Tit. 1. f. 42.

3 Comm. 174.

Right of
Possession.

§ 4. The next step to a good and perfect title is the right of possession, which may reside in one man, while the actual possession is in another. Thus in the case of a disseisin or abatement, the right of possession

is

is in the disseisee or heir, who may exert it whenever he thinks proper by an entry. And the actual possession is in the disseisor or abator.

§ 5. The right of possession is of two sorts:—An apparent right of possession, which may be defeated by proving a better; and an actual right of possession, which will stand the test against all opponents.

§ 6. Thus Lord Chief Baron *Gilbert* says—“ When
 “ any man is disseised, the disseisor has only the naked.
 “ possession, because the disseisee may enter and evict
 “ him; but against all other persons the disseisor has a
 “ right, and in this respect only can be said to have
 “ the right of possession; for in respect to the disseisee
 “ he has no right at all. But when a descent is cast,
 “ the heir of the disseisor has *jus possessionis*, because
 “ the disseisee cannot enter upon his possession and
 “ evict him, but is put to his real action because the
 “ freehold is cast upon the heir.”

Ten. 21.

Lit. f. 385.
 1 Salk. 685.

§ 7. Where the person who has the actual right of
 possession puts in his claim, and brings his action
 within a reasonable time, and can prove by what un-
 lawful means the ancestor became seised, he will then
 by sentence of law recover that possession to which he
 hath such actual right. Yet if he omits to bring this
 his possessory action within a competent time, his ad-
 versary may imperceptibly gain an actual right of
 possession.

2 Comm. 197.
 Vide Tit. 31.
 c. 2.

§ 8. When this happens the party kept out of pos-
 session has nothing left in him but the mere right of

Right of
 Property.

property, or *jus proprietatis*, without either possession or even the right of possession; and his estate is said to be divested and turned to a right. It is divested because the right owner is turned out of * possession; and it is turned to a right, because the right of possession, and consequently the right of entry, is lost, and nothing is left but the *jus merum*, or mere right of property, which cannot be regained by a possessory, but only by a real action.

Discontinu-
ance of an
Estate Tail.
Tit. 2. c. 2.
f. 14.

1 Inst. 327 b.

Gilb. Ten.
117.

1 H. Black.
Rep. 269.

§ 9. It has been already stated that a tenant in tail has not only the possession, but also the right of possession and inheritance in him, and therefore may alienate them by certain modes of conveyance, so as to take away the entry of the issue in tail, and of the persons in remainder or reversion, and drive them to their action; which is called a discontinuance: and therefore where a tenant in tail discontinues the estate tail, the person to whom the estate tail is conveyed has the right of possession, and the issue in tail the right of property. It is however a rule of law that, in order to work a discontinuance of an estate tail, the person discontinuing must be actually seised, by force of the intail.

Possession, and
Right of Pos-
session, and
Property.

§ 10. The union of the possession, the right of possession, and the right of property, constitutes a complete title to lands, tenements, and hereditaments: for it is an ancient maxim of the law, that no title is

* Divest (*devestire*) is contrary to invest; for, as investire signifies *possessionem tradere*, so *devestire* is *possessionem auferre*. Cowell, *voce* Divest.

completely

completely good, unless the right of possession be joined with the right of property, which right is thus denominated a double right, *jus duplicatum* or *droit* 1 Inst. 266 a. *droit*. And when to this double right the actual possession is also united, where there is, according to the expression of *Fleta*, *juris et seisinæ conjunctio*, then and then only is the title completely legal.

§ 11. Lord *Coke* has stated the whole of this doctrine in the following words—It is to be known that there is, *jus proprietatis*, a right of ownership, *jus possessionis*, a right of seisin or possession, and *jus proprietatis et possessionis*, a right both of property and possession; and this is anciently called *jus duplicatum* or *droit droit*; for example, if a man be disseised of an acre of land, the disseisee hath *jus proprietatis*, the disseisor hath *jus possessionis*; and if the disseisee release to the disseisor, he hath *jus proprietatis et possessionis*. Idem.

§ 12. The modes of acquiring a title to real property are two only,—by descent and purchase. The former, where the title is vested in a person by the single operation of law; the latter, where the title is vested by the person's own act and agreement. 1 Inst. 18 b. n. 2.

TITLE XXIX.

DESCENT.

CHAP. II.

Of Descent and Consanguinity.§ 1. *Nature of Descent.*3. *Of Consanguinity.*7. *Who may be Heirs.*8. *They must be Legitimate.*12. *And natural-born Subjects.*18. *A Title may be derived through an Alien.*20. *Persons attainted, incapable of inheriting.*

Section 1.

Nature of
Descent.

DESCEND or hereditary succession is the title whereby a man, on the death of his ancestor, acquires his estate, as his heir at law. An heir therefore is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending on the heir, is, in law, called *the inheritance*.

§ 2. Although the right of inheriting be known to the laws of every civilized country, and is founded on the best principles of reason, yet it is not a right founded on natural law, or which can belong to any man in a state of nature; from which, it follows, that the numerous and arbitrary rules by which its course is either directed or interrupted, can never properly be esteemed or objected to, as violations of natural justice.

§ 3. The

§ 3. The doctrine of descents, or law of inheritance in fee-simple, depends on the nature of kindred, and the several degrees of consanguinity. It will, therefore, be first necessary to state the true notion of this kindred or alliance in blood. Of-Confan-
guinity.

§ 4. Consanguinity or kindred is defined to be *vinculum personarum ab eodem stipite descendentium*—the connection or relation of persons descended from the same stock.

This consanguinity is either lineal or collateral. Lineal consanguinity is that which subsists between persons of whom one is descended in a right line from the other, as between father, grandfather, and greatgrandfather, or between father, son, and grandson. Every generation in this direct lineal consanguinity constitutes a degree, reckoning either upwards or downwards.

§ 5. Collateral consanguinity is that which subsists between persons who lineally descend from the same ancestor, who is the *stirps* or root, the *stipes*, trunk, or common stock; but who do not descend the one from the other.

§ 6. The method of computing the degrees of consanguinity by the canon law, which our law has adopted, is as follows: We begin at the common ancestor and reckon downwards, and, in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related. 1 Inst. 23 b.

Who may be
Heirs.

§ 7. With respect to the persons who are capable of claiming any inheritance as the heirs of a person who died seised of such inheritance, they must, 1st, be legitimate; 2d, they must be natural-born subjects or denizens; and, 3d, they must not be attainted of treason or felony, nor claim through any ancestor or relation who has been attainted of treason or felony.

They must be
Legitimate.
1 Inst. 7 b.
244 b. n. 2.
245 a. n. 1.

§ 8. No person can succeed to an estate as heir who is not born in lawful matrimony, for, it is a maxim of law, that *hæres legitimus est quem nuptiæ demonstrant*; and a bastard, being *filius nullius*, can neither inherit from its father nor mother, and, consequently, can have no heirs but his own children,

1 Inst. 126 a.
n. 2.

§ 9. By the old law, if the husband was within the four seas, that is, within the jurisdiction of the king, and his wife had issue, no evidence could be admitted to prove such issue a bastard, unless the husband was apparently incapable of procreation. But this doctrine is now altered; and evidence of the husband's non-access, and also evidence of any other kind, is admissible.

Pendrill v.
Pendrill,
2 Stra. 925.
Goodright
v. Saul,
4 Term R.
356.

1 Inst. 123 b.
n. 1.

§ 10. With respect to posthumous children, the rule formerly was, that they must be born within nine months, or forty weeks, after the death of the husband. But, now, the courts consider nine months merely as the usual time, and do not decline exercising the discretion of allowing a longer space, where the opinion of physicians, or circumstances of the case, have required it. And, in a modern case, upon an issue

Foster v.
Cook, 3 Bro.
R. 347.

issue directed out of Chancery, a child born forty-three weeks, except one day, after the husband's death, was found to be legitimate.

§ 11. Where a widow is suspected of feigning herself pregnant, with a view to produce a supposititious child, the presumptive heir may have a writ *de ventre inspiciendo*, to examine whether she be pregnant or not, and, if she be pregnant, to keep her under a proper restraint, until she is delivered.

1 Inst. 8 b.
n. 1. 123 b.
n. 1.

§ 12. No person is capable of inheriting lands, unless he is a natural-born subject; and, by the common law, every person born out of the king's dominions or allegiance was deemed an alien. But, to encourage foreign commerce, it was enacted by the statute 25 *Edward* 3. that all children born abroad, whose fathers and mothers were, at the time of their birth, in allegiance to the king, and the mother had passed the seas with her husband's consent, might inherit, as if born in *England*.

And natural-born Subjects.

§ 13. By the statute 7 *Ann* c. 5. it is enacted, that the children of all natural-born subjects, born out of the allegiance of her Majesty, her heirs or successors, shall be deemed to be natural-born subjects. And by the statute 4 *Geo.* 2. c. 21. reciting, that doubts had arisen respecting the construction of the statute 7 *Ann.* it is enacted, that all children born out of the ligeance of the crown of *England*, or which should be born out of such ligeance, whose fathers were or should be natural-born subjects, at the time of the birth of such

children, should, by virtue of the said act of 7 *Ann* and of this act, be adjudged to be natural-born subjects.

§ 14. By the statute 13 *Geo.* 2. c. 21. it is enacted, that all persons born out of the ligeance of the crown of *England*, whose fathers were or should be, by virtue of the statutes 7 *Ann* and 4 *Geo.* 2. entitled to the rights and privileges of natural-born subjects, should be deemed natural-born subjects.

§ 15. In consequence of these statutes, all persons born out of the king's allegiance, whose fathers or grandfathers were natural-born subjects, are held to be natural-born subjects, and are capable of inheriting.

Bacon v.
Bacon,
Cro. Car.
601.

§ 16. It was held in the reign of *Charles* 1. that, under the statute 25 *Edw.* 3. the child of an *English* merchant, born abroad, whose mother was an alien, should inherit. This determination was founded upon the principle, that the words of the statute 25 *Edw.* 3. *whose fathers, and mothers,* should be construed in the disjunctive.

Lit. Rep. 29.
1 Inst. 12 a.
a. 7.

But this construction has been contradicted in the following modern case,

Doe v. Jones,
4 Term R.
300.

§ 17. *Henrietta Knight*, a natural-born subject, quitted the kingdom, and married Count *Duroure*, an alien, by whom she had a son, born abroad; and the question was, whether this son was capable of inheriting lands in *England*, as heir to his mother.

Lord

Lord *Kenyon* said, that, supposing there existed any doubts respecting the meaning of the statute 25 *Edw.* 3. yet the subsequent statutes which had been passed relating to this subject, operated as a parliamentary exposition of it; particularly the statute 4 *Geo.* 2. c. 21. which had closed the question, by enacting, that all children born out of the ligeance of the crown of *Great Britain*, whose fathers were natural-born subjects; and also the statute 13 *Geo.* 2. c. 21. which extended the same privileges to grandchildren, but still confined them to the paternal line. From which, it clearly followed, that a person born in foreign parts, and of a foreign father, did not derive inheritable blood in this kingdom.

§ 18. At common law, no title could be derived through an alien. But now, by the statute 11 and 12 *Will.* 3. c. 6. it is enacted, that all persons being natural-born subjects may inherit, and make their titles by descent from any of their ancestors, lineal or collateral, although their father or mother, or their ancestor through whom they derive their pedigree, were born out of the king's allegiance. But, by a subsequent statute, 25 *Geo.* 2. c. 39., it is enacted, that no right of inheritance shall accrue, by virtue of the former statute, to any persons whatsoever, unless they are in being and capable to take as heirs at the death of the person last seised.

A Title may be derived through an Alien.

§ 19. If an alien be made a denizen by the king's letters patent, and then purchases lands, his son, born before his denization, cannot, by the common law, inherit

1 *Inst.* § 2.
129 a.

inherit those lands ; but a son born afterwards may, even though his elder brother were living. For the father, before denization, had no inheritable blood to communicate to his eldest son ; but, by denization, it acquired an hereditary quality, which will be transmitted to his subsequent posterity.

Persons attainted incapable of inheriting.

§ 20. Persons attainted of high treason or felony, are incapable of inheriting, or of transmitting their own property by heirship.

1 Inst. 8 a.
391 b.

Thus, Lord *Coke* says :—“ If a man be attainted of treason or felony, he can be heir to no man, nor any man heir to him, *propter delictum*. For that, by his attainder, his blood is corrupted ; and this corruption of blood is so high, as it cannot absolutely be salved and restored, but by act of parliament.”

Cent. 1 Ca. 2.
Cent. 5 Ca. 27.

§ 21. A person may, however, inherit from one of his parents, though the other should be attainted of treason or felony ; for *duplicatus sanguis* is not necessary in descents. Thus, it is said in *Jenkins*, an attainted person marries an heiress, and has issue by her ; that issue shall inherit, for the marriage was lawful, and he claims only from the mother.

Vide Noy
168, Rex v.
Boreston.

1 Inst. 163 b.

§ 22. Lord *Coke* says, if a man be seised of lands in fee and hath issue two daughters, and one of the daughters is attainted of felony, the father dieth, both daughters being alive, the one moiety shall descend to the one daughter, and the other moiety shall escheat.

§ 23. There

§ 23. There is a farther consequence of the corruption and extinction of hereditary blood, namely, that the person attainted shall not only be incapable himself of inheriting, or of transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him, from any remoter ancestor.

§ 24. Thus, it is laid down by Lord *Hale*, that if there be grandfather, father, and son, and the father is attainted, and dies in the lifetime of the grandfather, the son cannot inherit from the grandfather; because he must, of necessity, derive his descent through his father, which he cannot do, by reason of the attainder. P. C. P. i. 356.

§ 25. Where there were two brothers, and the youngest had issue a son, and was attainted of treason and executed; it was held, that the son of the youngest brother could not inherit from his uncle, because he must derive his descent through his father. Grey's Case, Dyer 274. Cro. Car. 543.

§ 26. It is, however, a general rule, that the attainder of a person who need not be mentioned in the derivation of the descent, does not prejudice, let the ancestor be never so remote; and, therefore, where a person may claim as immediate heir to an ancestor, without deriving his descent through an attainted person, he will not be affected by such attainder.

§ 27. Thus, if a man has two sons, and the eldest is attainted, and then the father dies, the younger brother Dyer 48 a.

brother cannot inherit from his father; for the elder brother, though attainted, is still a brother, and no other can be heir to the father, while he is alive. But if the elder brother dies in the lifetime of the father, the younger brother will then inherit from his father, because he can derive his descent from him, without mentioning his elder brother, or claiming through him. If the eldest son had left issue, the younger brother could not inherit.

Hob. 334.
Cro. Car. 435.

§ 28. The incapacity of the younger brother to inherit from his father, where the elder brother was attainted and alive, was considered as such a hardship, that, in 1 Hen. 4., a petition was preferred by the commons to the king, praying, that where the eldest son during the life of the father was attainted, the next brother might, notwithstanding, succeed as heir to his father. To which, the king answered, let the common law run.

Rot. Parl.
Vol. 3. p. 440.

1 Inst. 8 a.

§ 29. Lord *Coke* says, if a man hath issue two sons, and after is attainted, and one of the sons purchases lands, and dies without issue, the other brother shall be heir; for the attainder of the father only corrupts the lineal blood, and not the collateral blood between the brothers, which was vested in them before the attainder. And, afterwards, his Lordship says,—But some have holden, that if a man after he is attainted have issue two sons, that the one of them cannot be heir to the other, because they could not be heir to the father, for that they never had any inheritable blood in them.

But

But it is now settled, that the descent between brothers is immediate; and, therefore, that the attainder of the father does not prevent his sons from inheriting from each other; for, though the father is *medium differens sanguinis*, yet he is not *medium differens hæreditatis*.

Collingwood
v. Pace,
1 Vent. 413.
3 Salk. 129.

§ 30. The doctrine of corruption of blood was considered as so cruel and unjust, that, by a statute passed in 7 Ann, it was enacted, that it should cease upon the extinction of the *Stuart* family. But it has been revived by a modern statute.

Vide 2 Com.
256.
39 Geo. 3.
c. 93.

§ 31. In the descent of estates tail, no impediment arises from corruption of blood, as will be shewn in a subsequent chapter.

TITLE XXIX.

DESCENT

CHAP. III.

Of the Rules or Canons of Descent.

- | | |
|---|---|
| <p>§ 1. 1st Canon.—Inheritances lineally descend.</p> <p>2. Maxim that Nemo est Hæres viventis.</p> <p>3. The Ancestor must die seised.</p> <p>8. Exceptions to this Rule.</p> <p>10. Explanation of the first Canon.</p> <p>12. A Descent may be defeated by the Birth of a nearer Heir.</p> <p>17. Exclusion of the ascending Line.</p> <p>23. 2d Canon.—Males preferred to Females.</p> <p>25. 3d Canon.—The eldest Male succeeds.</p> <p>30. 4th Canon.—Right of Representation.</p> <p>35. 5th Canon.—Collateral Descents.</p> | <p>§ 36. The Heir must be descended from the first Purchaser.</p> <p>41. Descents ex parte paterna et materna.</p> <p>43. What Acts will alter the Descent.</p> <p>59. Rule of Collateral Descents.</p> <p>60. 6th Canon.—Exclusion of the Half Blood.</p> <p>66. What Seisin is necessary.</p> <p>77. Trusts descend to the whole Blood.</p> <p>78. Adoptions, Tithes, &c.</p> <p>84. 7th Canon.—The Male Stocks preferred.</p> <p>86. Mode of tracing an Heir at Law.</p> <p>95. Observations on Blackstone's Doctrine of Descents.</p> |
|---|---|

Section 1.

1st Canon.
Inheritances
lineally de-
scend.

THE first rule or canon of descent as laid down by Sir William Blackstone is—"That inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum*; but shall never lineally ascend."

To explain this and the subsequent canons of descent, it will be necessary to premise some maxims and principles

principles of the common law, which are applicable to this subject.

§ 2. It is a rule of the common law, that no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead: *Nemo est hæres viventis*. Before that time, the Person who is next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such whose right of inheritance is indefeasible, provided they outlive their ancestor; as the eldest son or his issue, who must by the course of the common law be heir to the father, whenever he happens to die. Heirs presumptive are such who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs; but whose right of inheritance may be defeated, by the contingency of some nearer heir being born.

Maxim that
Nemo est
Hæres Vi-
ventis.

§ 3. Another rule of the common law respecting descents, is, that no person can properly be such an ancestor, as that an inheritance can be derived from him unless he has had actual seisin, or, as Lord Coke expresses it, “A man that claimeth as heir in fee simple to any man by descent, must make himself heir to him that was last seised of the actual freehold and inheritance.”

The Ancestor
must die
seised.

1 Inst. 11 b.

Lord Hale says—“The last actual seisin in ancestor, makes him as it were the root of the tree, equally to many intents, as if he had been the sole proprietor; and therefore he that cannot, according to the course of the law, be heir, is not entitled to the inheritance.”

Hist. c. 11.

“ing to the rules of descents derive his succession
 “from him that was last actually seised, though he
 “might have derived it from some precedent ancestor,
 “shall not inherit.”

2 Comm. 209. § 5. The law requires this notoriety of possession as evidence that the ancestor had that property in himself, which is to be transmitted to his heir. The seisin therefore of any person makes him the root or stock from which all future inheritance by right of blood must be derived, which is briefly expressed in the maxim of *Fleta*, *Seisina facit stipitem*.

Tit. i. c. 35. § 6. The nature of seisin, and the difference between seisin in deed, and seisin in law, has been explained in a former title. It is therefore sufficient here to observe that when a person acquires an estate in land by descent, it is necessary that he should gain a seisin in deed, in order to transmit it to his heir; for if he has a seisin in law only, it will not be sufficient.

Lit. f. 8.
 1 Inst. 11 b.
 15 a.

1 Inst. 15 b. § 7. The rule is the same with respect to incorporeal hereditaments. So that where an advowson in gross or a rent, descends to a person, he must actually present to the church and receive the rent, before he can become the stock of a descent. But if the advowson be appendant to a manor, there actual seisin of the manor will give an actual seisin of the advowson.

Exceptions to
 this Rule.

§ 8. Where an ancestor acquires an estate by his own act, that is, by purchase, he is in many cases allowed

lowed to transmit it to his heirs; although he never had actual seisin of it himself.

Thus it is laid down *arguendo* in *Shelley's case*, that 1 Rep. 98 a.
if a fine was levied to A. in fee, and afterwards, but before execution, A. died, his heir might enter; and though he were the first that entered, yet he should be in by descent; it being a rule that, where the heir takes any thing which might have vested in the ancestor, the heir should be in by descent. It was however observed that in a case of this kind the heir would not have been in directly by descent, either to be in ward, or to have had his age, or to have tolled the entry of one who had right.

§ 9. In the case of an exchange, if both parties die before either enters, the exchange is totally void. 1 Rep. 98 b.
But if one of the parties enters, and the other dies before entry, his heir may enter, and shall be in by descent.

§ 10. In the case of equitable interests, an ancestor may transmit them to his heir without ever having obtained any kind of seisin or possession whatever.

Thus where a person contracts for the purchase of a real estate, and dies before it is conveyed to him, this equitable interest will descend to his heir, if not devised away. Potter v. Potter, 1 Vef. 437.

§ 11. I now return to the first canon of descent, in consequence of which, whenever a person dies seised

Explanation
of the first
Canon.

of a real estate, leaving issue, it immediately descends to such issue; on whom the law casts the freehold before entry.

A Descent
may be de-
feated by the
Birth of a
nearer Heir.

§ 12. In consequence of the principle that the freehold shall never if possible be in abeyance, lands always descend to the person who is heir at the time of the death of the ancestor; but such descent may be defeated by the subsequent birth of a nearer heir.

§ 13. Thus where a person dies leaving his wife enſient, the law, not considering the infant *in ventre matris* to be in existence, casts the freehold on the person who is then heir. But when the posthumous child is born, his guardian may enter upon such heir, and take the estate from him.

Goodtitle v.
Newman,
Infra.

§ 14. It seems to have been formerly doubted whether in a case of this kind the posthumous child was entitled to the profits from the death of his ancestor, or only from the time of his birth. But in a modern case Lord Ch. Just. *De Grey* laid it down as clear law, upon the authority of a case in the *Year Books*, *Trin. 9 Hen. 6. 25 a.* that a posthumous child was not entitled to any profits received before its birth, because the entry of the heir was congeable, until the posthumous child was born.

1 Inst. 11 b.

§ 15. Lord *Coke* says, if a man has issue a son and a daughter, and the son purchases lands in fee and dies without issue, the daughter shall inherit the land from him. But if afterwards the father has issue a son,

son, this son shall enter into the land as heir to his brother, and oust his sister.

§ 16. So where a son purchased land, and died without issue, the uncle entered as his heir, and two years after the father had issue another son; it was held that such other son might enter on his uncle.

Bro. Ab. Tit. Descent 58.

§ 17. The last clause of the first canon of descent, by which parents and all lineal ancestors are excluded from succeeding to the inheritance of their offspring, is derived from the Feudal Law, in which it was an established rule that the ascending line could in no case inherit a feud. This rule was fully established in England in the time of Henry 2. for Glanville says, *Hereditas nunquam autem naturaliter ascendit*. And it was probably derived immediately to us from the customs of Normandy.

Exclusion of the ascending Line.

Lib. 7. c. 1.
3 Rep. 40 d.
12 Mod. 623.

§ 18. Littleton says—"If there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father; yet the father is nearer of blood; because it is a maxim in law, that inheritance may lineally descend, but not ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heir to the son (as by the law he ought) and after the uncle dieth without issue living, the father shall have the land, as heir to the uncle, and not as heir to his son."

Sec. 3.

1 *Inst.* 11 *b.*

§ 19. Lord *Coke* has observed on this passage that if the uncle does not enter, the father cannot inherit from him, because he must make himself heir to the person last seised, which the uncle was not, for the person last seised was the son, to whom the father cannot make himself heir.

Hist. c. 11.

§ 20. Lord *Hale* says, that by the law of *Normandy* the father was postponed to the brother and sister, and their issues, but was preferred before the uncle. According to the *Jewish* law, the father was preferred before the brother; by the *Roman* law he succeeded equally with the brother. But by the *English* law the father cannot take from his son by an immediate descent, but may take as heir to his brother, who was heir to his son, by collateral descent.

§ 21. A father or mother may however be cousin to their own child, and in that relation may inherit from him, notwithstanding the relation of father or mother.

Eastwood v.
Vincke,
2 *P. Wms.*
614.

§ 22. A son died seised of lands in fee, without having any issue, or brother or sister, but leaving two cousins his heirs at law, one of whom was his own mother. And the question was, whether the mother could take as heir to her own son.

It was determined by the Master of the Rolls, that though a father or mother could not, as father or mother, inherit immediately after the son, yet if the case should so happen, that the father or mother were
cousin

cousin to the son, and as such his heir, they might take notwithstanding. And that here, though the heir was also mother, this did not hinder her from taking in the capacity or relation of cousin.

§ 23. The second canon or rule of descent is—
“ That the male issue shall be admitted before the
“ female.”

2d Canon.
Males preferred to Females.

Thus sons shall be admitted before daughters; or, as Lord *Hale* expresses it,—In descents the law prefers the worthiest of blood, therefore the son inherits, and excludes the daughter; the brother is preferred before the sister, the uncle before the aunt.

§ 24. This preference of males to females is evidently derived from the feudal law; but the *English* law does not extend to a total exclusion of females, it only postpones them to males: for though daughters are excluded by sons, yet they succeed before any collateral relations.

§ 25. The third canon or rule of descent is, “ That
“ where there are two or more males, in equal degree,
“ gree, the eldest only shall inherit, but the females
“ altogether.”

3d Canon.
The Eldest Male succeeds.

The doctrine of primogeniture is also of feudal origin; for although upon the first introduction of hereditary succession in feuds, they descended to all the sons, yet that course was changed, in consequence of a constitution of the Emperor *Frederick*: and this

doctrine appears to have been first introduced into England by William the Norman, but was only applied to honorary and military fees, which could not be divided without great inconvenience.

Lib. 7. c. 3.

§ 26. Thus it appears from *Glanville* that in the reign of Hen. 2. estates held by military service descended to the eldest son only; and estates held in socage were partible among all the sons.—*Cum quis ergo hæreditatem habens moriatur, si unicum filium hæredem habuerit, indistinctè verum est quod filius ille patri suo succedit in totum. Si plures reliqueret filios, tunc distinguitur utrum ille fuerit miles, sive per feodum militare tenens, aut Liber Sokemannus, quia si miles fuerit, vel per militiam tenens, tunc secundum jus regni Angliæ, primogenitus filius patri succedit, in totum, ita quod nullus fratrum suorum partem inde de jure petere potest. Si vero fuerit Liber Sokemannus tunc quidem dividetur hæreditas inter omnes filios quotquot sunt, per partes equales.*

Hist. c. 11.

§ 27. Lord Hale says that in Normandy lands were of two kinds, partible and not partible; the lands that were partible were valvasories burgages and such like, which were much of the nature of our socage lands; these descended to all the sons, or to all the daughters. Lands not partible were fiefs and dignities; they descended to the eldest son, and not to all the sons; but if there were no sons, then to all the daughters, and became partible.

§ 28. The right of primogeniture appears however to have been fully established in the reign of Hen. 3. in socage lands, as well as in those held by a military tenure. For *Bracton*, in stating the law of descents, 64 b. says:—*Si quis plures habet filios jus proprietatis semper descendit ad primogenitum, eo quod ipse inventus est primo in rerum natura.*

§ 29. As to the females, being all equally incapable of performing any military service, there could be no reason for preferring the eldest. And therefore f. 241. *Littleton* says, where a man or woman seised of lands in fee or in tail hath no issue but daughters, all the daughters shall equally inherit, and make but one Tit. 19. f. 1. heir.

§ 30. The fourth canon or rule of descent is,— 4th Canon.
“ That the lineal descendants *in infinitum* of any per- Right of Re-
“ son deceased, shall represent their ancestor, that is, presentation.
“ shall stand in the same place as the person himself
“ would have done, had he been living.”

§ 31. “ Hence it is (says Lord *Hale*) that the son Hist. c. 11;
“ or grandchild, whether son or daughter, of the
“ eldest son, succeeds before the younger son; and
“ the son or grandchild of the eldest brother, before
“ the youngest brother; and so through all the de-
“ grees of succession, by the right of representation,
“ the right of proximity is transferred from the root
“ to the branches, and gives them the same prefer-
“ ence as the next and worthiest of blood.”

1 Inst. 10 b.

§ 32. It follows from this rule that the nearest relation is not always the heir at law; as the next cousin *jure representationis*, is preferred to the next cousin *jure propinquitatis*; and the taking by representation is called succession *per stirpes*, according to the roots; since each branch inherits the same share that their root or *stirps*, whom they represent, would have taken.

Hist. c. 11.

§ 33. Thus Lord Hale says—"This right transferred by representation is infinite and unlimited in the degrees of those that descend from the represented. For the son, the grandson, and the great-grandson, and so *in infinitum*, enjoy the same privilege of representation as those from whom they derive their pedigree had, whether it be in descents lineal or transversal; and therefore the great-grandchild of the eldest brother, whether it be a son or a daughter, shall be preferred before the younger brother, because, though the female be less worthy than the male, yet she stands in right of representation of the eldest brother, who was more worthy than the younger."

Idem.

§ 34. So, "if a man have two daughters, and the eldest dies in the life of the father, leaving six daughters, and then the father dies, the youngest daughter shall have an equal share with the other six daughters, because they stand in representation and stead of their mother, who could have but a moiety."

§ 35. The fifth canon or rule of descent is—
 “ That on failure of lineal descendants or issue of the
 “ person last seised, the inheritance shall descend to
 “ his collateral relations, being of the blood of the
 “ first purchaser, subject to the three preceding
 “ rules.”

5th Canon.
Collateral
Descents.

§ 36. It is a maxim of the common law that no person can inherit an estate, unless he is descended from the first purchaser, or original acquirer of it. This rule is to be found in the *Grand Coustumier* of Normandy, ch. 25. from whence it was introduced here, and is plainly derived from the feudal law; for when feuds first became hereditary, no person could succeed to a *feudum novum* but the lineal descendants of the person who first acquired it, who was called the *perquisitor*. So that if a person died seised of a feud of his own acquiring, without leaving issue, it did not go to his brothers, but reverted to the donor. If it was a *feudum antiquum*, that is, if it had descended to the vassal from his ancestors, then his brothers, or such other collateral relations as were descended from the person who first acquired it, might succeed.

The Heir
must be de-
scended from
the first Pur-
chaser.

§ 37. Thus Lord Hale says, if the son purchases land and dies without issue, it shall descend to the heirs of the part of the father; and if he has none, then to the heirs on the part of the mother; because though the son has both the blood of the father and of the mother in him, yet he is of the whole blood of the mother; and the consanguinity of the mother are

Hist. c. 11.

consanguinei

consanguinei cognati of the son; and of the other side, if the father had purchased lands, and it had descended to the son, and the son had died without issue, and without any heir of the part of the father,—it should *never* have descended in the line of the mother, but escheated. For, though the *consanguinei* of the mother were the *consanguinei* of the son, yet they were not of consanguinity to the father, who was the purchaser. But if there had been none of the blood of the grandfather, yet it might have resorted to the line of the grandmother; because her *consanguinei* were as well of the blood of the father, as the mother's consanguinity is of the blood of the son. Consequently also, if the grandfather had purchased lands, and they had descended to the father, and from him to the son; if the son had entered and died without issue, his father's brothers or sisters, or their descendants; or, for want of them, his great-grandfather's brothers or sisters, or their descendants; or, for want of them, any of the *consanguinity* of the great-grandfather, or brothers or sisters of the great-grandmother, or their descendants, might have inherited. For the consanguinity of the great-grandmother was the consanguinity of the grandfather. But none of the line of the mother or grandmother, viz. the grandfather's wife, should have inherited, for that they were *not* of the blood of the first purchaser. And the same rule, *è converso*, holds in purchases in the line of the mother or grandmother. They shall always keep in the *same* line that the first purchaser settled them in.

§ 38. When the feudal rigor was in part abated, a method was invented to let in the collateral relations of the first purchaser to the inheritance by granting a *feudum novum*, to hold *ut feudum antiquum*, that is, with all the qualities annexed, of a feud derived from his ancestors: and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of the first imaginary purchaser. 2 Comm. 221.

§ 39. In imitation of this rule, it has long been established, that every acquisition of an estate in fee simple by purchase, is considered by the *English* law as a *feudum antiquum*, or feud of indefinite antiquity; and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance. 2 Comm. 222.

§ 40. But Sir *William Blackstone* observes, that when an estate hath really descended in a course of inheritance to the person last seized, the strict rule of the feudal law is still observed; and none are admitted but the heirs of those through whom the inheritance hath passed; for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed. Idem.

§ 41. Thus where lands descend to a person on the part of the father, none of his relations on the part of his mother can inherit them; and *vice versa*, where lands

Descents ex
Parte Paterna
et Materna,
1 Inst. 12 a.
Hale v. 2.
120.

lands descend to a person from his mother, no relation on the part of his father can inherit them.

1 Inst. 13 a.
Doug. R.
773. d1

§ 42. Inheritances of this kind cannot be created by any act of the parties; for if a person gives lands to another, to hold to him and his heirs, on the part of his mother, yet the heirs on the part of the father shall inherit. For no man can create a new kind of inheritance not allowed by the law; and therefore the words—"On the part of his mother," are void.

What Acts
will alter the
Descent.

§ 43. Where a person is seised in fee by descent *ex parte paterna*, or *ex parte materna*, there are many acts which may be done by such a person that will operate so as to make him a new purchaser of the estate, by which means it will be considered as a feud of indefinite antiquity; and will by that means become descendible to his heirs general, whether of the paternal or maternal line.

1 Inst. 12 b.

n. 2.

§ 44. Thus Lord Coke says, if a man be seised of lands as heir of the part of his mother, and maketh a feoffment in fee, and taketh back an estate to him and to his heirs, this is a new purchase; and if he dieth without issue, the heirs of the part of the father shall inherit. Mr. Hargrave has observed on this passage that Lord Coke must be understood to speak of two distinct conveyances in fee. The first passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land; and the second regranting the estate to him.

§ 45. If a person seized *ex parte materna* makes a feoffment in fee, reserving a rent to himself and his heirs, this rent will go to the heirs *ex parte paterna*; because the feoffment in fee was a total disposition of the land; and the rent was acquired by purchase.

1 Inst. 12 b.

§ 46. The renewal of a lease being considered as a new acquisition, the person renewing becomes a purchaser, and the descent is thereby altered.

§ 47. *Elizabeth Mason* having purchased a lease for three lives, died leaving *Mary* her daughter and heir, an infant. Two of the lives being dead, the guardians of the infant, out of the profits of the estate, took a new lease, to the infant and her heirs, during three new lives, and afterwards the infant died without issue.

Mason v. Day,
Prec. in Cha.
319.

The question was, whether this lease should descend to the heirs of the infant *ex parte paterna* or *materna*.

It was contended that it should go to the heirs *ex parte materna*, being a renewal only of the old lease, and under the old trust. And if the infant heir had died without issue, before the renewal, living the surviving *cestui que vie*, there had been no question of it; and so ought this new lease, being renewed out of the profits of the old lease.

But it was answered and resolved by the Master of the Rolls, that this new lease was a new acquisition, and vested in the daughter, as a purchaser, and therefore

fore should first go to the heirs of the part of the father. And it was decreed accordingly.

The Lord Keeper coming into court, and being asked his opinion on it, said, he was of the same opinion, to prevent a rehearing.

Peirson v.
Shore,
1 Atk. 480.

§ 48. In a subsequent case exactly similar, it was objected that the renewal was an act done by a guardian, only during the minority; and ought not to prejudice any who take by representation, it being merely voluntary, and not of necessity.

But Lord *Hardwicke* answered—"If this had been
" wantonly done by the guardian, without any real
" benefit to the infant, it would have been proper to
" have come into a Court of Equity, to be relieved
" against it. But here was a just and reasonable oc-
" casion for what the guardian has done, for he was
" directed to make purchases for the benefit of the
" infant. Here one life being dead, surrendering the
" old, and taking a new lease, was the most beneficial
" purchase for the infant that could be, and therefore
" ought to have the same consequence as if done by
" the infant herself at her full age, and go to her
" heirs *ex parte paterna*."

The case of *Mason v. Day* is exactly in point. His Lordship dismissed the bill brought by the heir *ex parte materna*.

§ 49. A trust estate is descendible in the same manner as a legal one; so that where a trust estate descends from the mother, it will go to the heirs *ex parte materna*. But where the legal estate descends *ex parte materna*, and the trust estate *ex parte paterna*, or *vice versa*, the trust estate will merge in the legal, and both will follow the line through which the legal estate descended.

Tit. 12. c. 2.
f. 31.

§ 50. Serjeant *Selby* agreed for the purchase of the estate in question, and paid for it, but died before any conveyance was made; having by his will devised all his real and personal estate to his wife, in trust to educate and maintain his son, until he should attain the age of twenty-one years; and afterwards in trust to convey all the rest of his real estate to his son and his heirs. After the testator's death, the estate was conveyed to Mrs. *Selby* who died before the son attained twenty-one, but he afterwards attained that age and died, having been in possession of the estate, and having devised it to charitable uses, which were void by the statute of mortmain. The lessor of the plaintiff was his heir at law on the part of the mother, and the defendants were his heirs at law on the part of the father's mother.

Goodright v. Wells,
Doug. R. 771.

Lord *Mansfield*.—Serjeant *Selby* after his purchase was owner of the equitable estate, and had a right to go into Chancery to compel a conveyance. After his death the vendor conveyed to the widow; which conveyance was absolutely in trust for the son. He outlived his mother, and, on her death, the trust estate was completely

Tit. 12. c. 1.
f. 30.

completely vested in him, and the legal estate descended to him from her. The question is, to whom the whole estate descended, on the death of the son, for it did descend, the devise to charitable uses being void. If it descended from the mother, the lessor of the plaintiff takes as heir at law. But it was contended that though he is heir, there is a trust for the paternal heirs; and it was said to be settled that the court will not suffer a trustee to recover in ejectment against the *cestui que trust*. A case so circumstanced as this in every particular probably never existed before, and perhaps never may again; but cases must often have happened in which the general question would arise, viz. whether when *cestui que trust* takes in the legal estate, possesses under it, and dies, the legal and equitable estates shall open on his death, and be severed for the different heirs. Consider first upon authority, and secondly upon principle. First, no case has ever existed where it has been so held, none where the heir at law of one denomination has, on the death of the ancestor, been considered as a trustee for the heir at law of another denomination; who would have taken the equitable estate if that and the legal estate had not united. Secondly, on principle it seems to me impossible, for the moment both meet in the same person, there is an end of the trust. He has the legal interest, and all the profits by his best title. A man cannot be a trustee for himself. Why should the estates open upon his death? What equity has one set of heirs more than the other? He may dispose of the whole as he pleases, and if he does not, there is no room for Chancery to interpose, and the rule of law must

must prevail. *Quacunq; via data* therefore, the lessor of the plaintiff is intitled. If the question is doubtful then in this court the legal right must prevail; and if the weight of opinion and argument is, that the legal estate must draw the trust after it, the case is still stronger against the defendants. Judgment was given for the plaintiff.

§ 51. Where an estate is devised to an heir at law in such a manner as to make him a purchaser of it, *Vide Tit. 38.* the descent will be altered.

§ 52. No conveyance of a particular estate will alter the mode of descent of the reversion, because it is not a total departure of the estate. And therefore if a person seised *ex parte materna*, makes a gift in tail, or lease for life, reserving rent, the heir on the part of the mother shall have the reversion, and also the rent, as incident thereto. *1 Inst. 12 b.*

§ 53. If a person seised *ex parte materna* makes a feoffment in fee upon condition, his heir *ex parte paterna* shall enter for the condition broken, but the heir *ex parte materna* shall enter upon him and enjoy the estate, because an entry for a condition broken reverts the old estate. *Idem.* *Tit. 13. c. 2. f. 59.*

§ 54. Where a person seised *ex parte materna* makes a feoffment in fee, and the use is expressly limited to the feoffor and his heirs, or if there is no declaration of uses, and the feoffment is not on such a consideration as to raise a use in the feoffee, and consequently *1 Inst. 12 b. n^o 2. 1 Rep. 100 b.*

Tit. 11. c. 4. frequently the use results to the feoffor; in either case
f. 16. he is in of the ancient use, and not by purchase, and
therefore the descent is not altered.

Godbolt v.
Frelstone,
3 Lev. 406.

§ 55. A person seised of lands by descent *ex parte materna* made a feoffment of them to uses. As to *Blackacre* to the use of himself for life, remainder to his wife for life, remainder to the heirs of his body on his wife begotten, remainder to his own right heirs. And, as to *Whiteacre*, to the use of himself for 99 years, if he should so long live; remainder to his wife for life; remainder to his first and other sons in tail male; remainder to himself and his right heirs. It was adjudged, that, upon the death of the husband without issue, the remainder descended to the heirs of the feoffor *ex parte materna*; because the ancient fee remained in him.

§ 56. Where a fine is levied, or a recovery suffered; or, where a fine is levied to make a tenant to the *præcipe*, and a recovery suffered against such tenant, and the uses are declared to the person levying the fine, or suffering the recovery; or, where no uses are declared, the mode of descent of the estate will not be altered.

Abbot v.
Burton,
11 Mod. 181.

§ 57. *A.* being seised in right of his wife of lands, which she had by descent on the part of her mother; the husband and wife by deed covenanted to levy a fine, which was thereby declared should be to the use of the conusees and their heirs, to make them tenants to the *præcipe*, in order to suffer a common recovery :
and

and afterwards such recovery was had accordingly ; which by the same deed was declared should be to the use of the said *A.* for his life, and to his said wife for her life, and then to the first and every other son of their two bodies in tail male, remainder to the right heirs of the wife.

A. and his wife died without issue ; and the question was, whether the lands should descend to the heir of the wife on the part of the mother, or to her heir on the part of the father.

Trevor, Ch. Just. delivered the opinion of the Court. In the arguing of this case it has been insisted on, that there is a difference between a use resulting by implication of law, and a use limited by express words ; but we are to consider how this point stood before the statute of uses. Before that statute the law considered the estate of the land, and the use of the land, as two distinct things ; and therefore, before that statute, if a man had made conveyance either by deed of feoffment, or any other legal conveyance, he might therein by express limitation have declared the use of the land ; or, if there were no express limitation, the law gave it back to him again ; for he was not to pass away the pernancy of the profits, without some consideration or estoppel, by express limitation : so that a man might at common law have separated the use and the estate ; and though the use and pernancy of the profits were neither created nor guided by the common law, yet the law took notice of them, and the *cestui que use* had a remedy by subpoena, so that the use was

taken notice of as distinct from the land, even at common law. Then comes the statute 27 Hen. 8. c. 10. and what alteration that made is to be considered. This statute executes the possession of the land in the same plight and manner as the use was before: therefore, as this conveyance is, this ancient use, which results back, is not a new use; for it must be an old use, if it result back as not disposed of, and so much of the ancient use still remained in him, as was undisposed of. Now, if the use would have gone this way before the statute, it will still go the same way since the statute. It is the same thing, whether the ancient use comes back by implication of law, or by limitation of the party: for that the construction of law is founded on a supposal of the intention of the parties, and will convey and carry the use the same way as it is supposed the party would have done. Now, if the law be so in the case of a resulting use, which arises by implication of law, what reason is there, why it should have a different construction, where there is an express declaration of the party? Especially, since this declaration makes no alteration of the estate; and the other use, limited to A. and his wife, is only a new interest arising out of the conveyance only, because it is not so large an estate as the fee was before. But, where the limitation is in fee, it makes no alteration, "because the one is as large an estate as the other; and it is still the same residue, remaining in the wife, which she had not disposed of before, that is a part, taken out of the whole, and of the same nature as the other was; and this appears so, not only from the reason of the thing, but there are other

other authorities also, which seem to settle this point. And it is all one, whether this ancient use in fee was created by implication of law, or by express limitation of the party, if it be of the same estate. In the case of *Godbolt v. Freeftone*, these authorities are held to be good. A difference has been made between this case and that of *Godbolt v. Freeftone*; namely, that this was not an immediate conveyance, as a feoffment to a person in fee, but that here there was a covenant to levy a fine, which was to be to the use of the conusees and their heirs, with an intent to have a common recovery: and hereupon the chief objection is, that not only the legal estate, but also the use, passed to the conusees both in law and equity; so that, when a recovery was suffered, the use in fee must arise out of the estate of the conusees. This carries the case a step farther than that of *Godbolt v. Freeftone*; and it is fit I should give an answer to it. Now, this opinion seems to me to be grounded on taking this common recovery in a wrong sense: for this fine and recovery may be taken as two distinct conveyances, and, taking it as such, it is subject to this objection. But, as it may be taken as two several, it may as well be taken as one single conveyance; and the deed, the fine, and the recovery may well be taken as several parts of one and the same conveyance, which is the case in question, and easily resolved: for, where such a conveyance is made by deed, fine, and common recovery, though the estate do move from one to another (as conduits) yet the estate originally moves only from the conusor, and the estate is always in a manner in him; as, if the estate be declared to one for

Ante, f. 55.

life, remainder in tail, and no limitation of the use of the fee, the use shall result back to the conusor, and not go to the conusee or recoverors. And so, if there be a limitation of the use of the fee, that use shall and must arise out of the estate of the conusor, and not out of the estate of the recoverors.—Judgement was given in favour of the heir *ex parte maternâ*.

§ 58. There is one sort of fine which alters the descent; and one case in which a common recovery has the same effect; of which an account will be given under those respective titles.

Tit. 35, 36.

Rule of Col-
lateral De-
scents.
2 Comm. 223.

§ 59. To return to the fifth canon of descent, Sir *William Blackstone* says, the great and general principle upon which the law of collateral inheritances depends, is, that upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have originally descended; according to the rule laid down in the Year Books, *Fitzherbert* and *Hale*;—"That he who would have been heir to the father of the deceased, (and of course to the mother or any other real or supposed purchasing ancestor,) shall also be heir to the son." A maxim that will hold universally; except in the case of a brother or sister of the half blood.

§ 60. The sixth canon or rule of descents is, that the collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

6th Canon.
Exclusion of
the Half
Blood.

§ 61. Sir William Blackstone observes that this and the other rule of inheritance that remains are only rules of evidence calculated to investigate who the purchasing ancestor was.

§ 62. By the ancient customs of Normandy, a *frater uterinus* could not inherit from his brother, when the inheritance descended from the father, and *vice versa*; from which the origin of the custom of excluding the half blood probably arose. For Bracton states it as doubtful, whether the half blood on the father's side was excluded from an inheritance, which originally descended from the common father, or only from such as descended from the respective mothers; and from newly purchased lands,

Grand. Court.
c. 25.

fo. 65 a.

§ 63. It appears, however, from Britton, ch. 119, that, when he wrote, the half blood was excluded from inheriting in all cases. And, in 5 Edw. 2. a case arose in which it was determined, that, where a person died seised of lands, leaving a sister of the half blood, and an uncle of the whole blood, the uncle should inherit, and not the sister.

Mayn. 148.
Bro. Ab.
Tit. Descent
Pl. 20.

§ 64. It is therefore laid down by Littleton, that if a man has two sons by divers venters, and the elder purchases lands in fee simple and dies without issue, the younger brother shall not have the land, but the

f. 6, 7.

uncle of the elder brother, or some other his next cousin shall have the same; because the younger brother is but of the half blood. So if a man has a son and a daughter by one venter, and a son by another venter, and the son by the first venter dies without issue, his sister shall be his heir.

Bro. Ab. Tit.
Descent, 20.

§ 65. If a man has three daughters by one venter and one daughter by another venter, and dies seised of lands, and all enter, and after two of the daughters by the first venter die, the third daughter of the first venter shall be heir to them, and shall have their two parts, and the fourth daughter shall take nothing from them, because she is of the half blood.

What Seisin
is necessary.

c. 8.

§ 66. We have seen, that no person can be such an ancestor, as that an inheritance may be derived from him, unless he had actual seisin. Thus, *Littleton* says,
 “ When a man is seised of lands in fee simple, and
 “ hath issue a son and a daughter by one venter, and
 “ a son by another venter, and die, and the eldest
 “ son enter and die without issue, the daughter shall
 “ have the land and not the younger son; yet the
 “ younger son is heir to the father, but not to his
 “ brother. But, if the elder son doth not enter into
 “ the land after the death of his father, but die be-
 “ fore any entry made by him; then the younger
 “ brother may enter, and shall have the land, as heir
 “ to his father. But, when the elder son in the case
 “ aforesaid enters after the death of his father, and
 “ hath possession, there the sister shall have the land;
 “ because

“ because it is a rule, that *possessio fratris de feodo simplici facit sororem esse heredem.*” 3 Rep. 41 b.

§ 67. In consequence of this doctrine, it frequently becomes necessary to determine, whether the heir acquired such a seisin, upon the death of his ancestor, as is required by law, to make him the stock of the inheritance: for, if he has not acquired such a seisin, then his ancestor is the person who was last seised of the inheritance; and to whom the claimants must make themselves heirs.

§ 68. It has been stated, that an entry is in most cases necessary to acquire a seisin in deed; and that, where lands lie in different counties, there must be an entry in each county. Thus, where the demesnes of a manor extended into two counties, the eldest son entered into the demesnes in one county only, and took the profits in one county only, and died, without issue. It was said by *Manwood*, that his sister of the whole blood should inherit the demesnes whereof her brother was seised, and the brother of the half blood the rest. Tit. 1. f. 35. 1 Inst. 15 a. 1 Leon. 265.

§ 69. It has also been stated, that the possession of a termor for years is the possession of the person entitled to the freehold. Hence Lord *Coke* says, if a father makes a lease for years, and the lessee enters, and the eldest son (having succeeded his father) dies during the term, before entry, or receipt of rent; the younger son of the half blood shall not inherit, but the sister; because the possession of the lessee for years is Tit. 1. f. 39. 1 Inst. 15 a.

is the possession of the elder son, so as he is actually seised of the fee simple: and consequently, the sister of the whole blood is to be heir.

Jenk. Cent.
6. Ca. 25.

§ 70. *A.* seised in fee had two daughters by several venters; and devised a moiety of the land to his wife for seven years, and that the eldest sister should enter on the other moiety, on the day of her marriage. *A.* died; his wife entered and educated the daughters: the eldest sister entered with her husband into the other moiety; the younger sister died without issue.—Resolved, that the heir of the whole blood of the younger sister should have her moiety: for the possession of the mother, for seven years, was an actual possession in the younger sister.

Tit. 20. f. 11.

§ 71. It has been stated that the possession and seisin of one tenant in common is the possession and seisin of the other, and such a possession will exclude the half blood.

Small v.
Dale,
Moo. 868.
Hob. 120.

§ 72. *A.* had issue *B.* a son and *M.* a daughter by one venter, and *N.* and *O.* daughters by another venter, and *C.* a son by a third venter, and devised all his lands to his wife *durante viduitate* and died. The wife entered into all. *B.* the eldest son died without having entered. It was adjudged that the will was void for a third part, and that the entry of the wife into all made her seised but of two parts and tenant in common with her son of the third part, and that the entry of the wife should vest such possession in common in the son of the third part as should make a
possession

possessio fratris in him for his sister of the whole blood to inherit after the younger son.

§ 73. The possession of a guardian in socage is the possession of the ward; who thereby acquires an actual seisin without entry. And, where a posthumous son is born, and his mother is in possession of the lands whereof his father died seised, she becomes his guardian in socage; and the infant son will be thereby deemed to be actually seised of the inheritance, so as to exclude the half blood. 1 Inst. 15 a.

§ 74. *Alexander Newman* being seised in fee of four messuages, and having issue two daughters, died leaving his second wife *ensient* with a son, who was born six weeks after the death of his father, and lived five weeks, and then died; his mother continuing all that time in possession of the houses, residing in one of them with the two daughters, and receiving rent for the others. The question was, whether this was such a seisin as would exclude the daughters. It was argued for the plaintiff the heir at law of the son, that the son died last actually seised in fee, by descent, of the premises. That, upon the death of the father, the premises descended upon his two daughters; who, together with the mother being *ensient* with a son, were then in rightful possession; that, upon the birth of the son, six weeks after, the estate of the daughters was divested out of them, and the mother then became, and was, guardian in socage to her son; and that her possession and receiving the rents and profits, was the actual possession and seisin of the son, and would carry

Goodtitle v. Newman, 3 Will. 516.

carry the descent of the premises to the heir at law of the son. The infant son was in possession as much as it was possible for an infant to be: for he was born, lived, and died, in one of the houses, which gave a title to the heir of the whole blood; for the law would presume, that the mother entered rightfully, as guardian to her infant son; and not wrongfully. For the defendant it was argued, that the rule of *possessio fratris* was extremely severe, and ought not to be extended, but should be construed as favourably as possible in favour of the daughters; that, to make a *possessio fratris*, there ought to be an actual seisin; that it was not found or stated in the case, that the mother entered as guardian in socage, but that she and the two daughters continued in possession from the time of the husband's death; and that, six weeks after his death, the son was born, and died in the same house; that this was a continuance of the old estate in herself and the daughters, or in the daughters only; for the law would adjudge the possession in those, who had a lawful right to the possession, namely the daughters; and the court could not determine, upon the facts stated in the case, whether the mother was in possession as guardian to the son, or as a trespasser, or for her quarentine in order to have dower.

Tit. 6. c. 4.
f. 4.

Lord Ch. Just. *De Grey*, having stated the case, delivered the unanimous opinion of the court. "This
" is an ejectment, brought by the heir of a posthu-
" mous son, to recover the premises in question,
" which were purchased by his father; who died
" seised

“ seised thereof in fee simple, the 4th of June 1760,
 “ leaving two daughters by his first wife, and his se-
 “ cond wife *ensient* with this posthumous son. The
 “ wife and daughters remained in the same house
 “ where the father died : then the wife received some
 “ rent for the houses ; and afterwards, in July 1760,
 “ the son was born, and in his lifetime the widow
 “ received more rent : then the son died, having
 “ lived five weeks and three days, and she received
 “ some more rent after his death. Lands in fee
 “ simple must descend to the heir of the whole blood
 “ of the person last actually seised thereof : and this
 “ is a maxim in the law of *England*, which has sub-
 “ sisted for ages, as appears by *Bracton*, l. 2. fo. 65.
 “ *Britton*, cap. 119. fo. 271. *Fleta*, l. 6. cap. 1. § 14.
 “ Although this may sometimes be very hard upon
 “ some children of the half blood of the person last
 “ actually seised, yet we must take the law as it is,
 “ and determine accordingly. The question there-
 “ fore is, whether this posthumous son was actually
 “ seised of the premises in question ?

“ Upon the death of the father, his two daughters
 “ would have been good tenants to the *præcipe* before
 “ the birth of the posthumous son, who could not
 “ lay his title before he was born ; the law vested the
 “ *seisin in law* in the daughters upon the death of the
 “ father, and in like manner vested the seisin in law
 “ in the son the moment he was born : if the
 “ daughters had aliened or been disseised, the son
 “ would not have been *actually seised*, but would only
 “ have had a *right of entry* upon the possession of the
 “ alienee

“ alienee or disseisor. This was the ground of my
 “ brother *Hill*’s argument, namely, that the daughters
 “ were disseised by the mother, and that the son
 “ died having only a *right of entry*, so was never
 “ actually seised. But the daughters were in actual
 “ possession as well as the mother, (of one house),
 “ from the time of the death of their father until
 “ the birth of the son; and were also in actual pos-
 “ session of the other three houses, by the possession
 “ of the tenants thereof; whether any rent had been
 “ due, received, or not received, before the birth of
 “ the son. 3 *Rep.* 41, 42. *Moor* 125. *Co. Lit.* 14, 15.
 “ And the rent, which was due and received before
 “ the birth of the son, belonged to the daughters,
 “ who were actually seised. For, by *Babington* (Ch.
 “ Just. C. B.) *Trin.* 9 H. 6. 25 a. if a man has issue
 “ a daughter and dies, his wife being *ensent*, the
 “ daughter may lawfully enter; and, if she dies, her
 “ heir may enter and take the profits for the time;
 “ and, afterwards, if the wife, being *ensent* by the
 “ ancestor paramount, is delivered of a son, the son
 “ may enter, notwithstanding that the heir of his
 “ sister is in by descent; but he shall not have an
 “ action of account, or any remedy for the issues in
 “ the mean time before his birth; because their entry
 “ was congeable until he was born; and if a church
 “ becomes void, and the sister or heir present, and
 “ their presentee be instituted and inducted before
 “ his birth, he shall not have the advantage of the
 “ avoidance; and yet by such presentation he shall
 “ not be out of possession. At the time of the birth
 “ of the son (in the present case) his mother was in
 “ possession,

“ possession, as well as the daughters; the moment
 “ he was born she became guardian in socage; and,
 “ upon supposition that nothing was done to hinder
 “ it, the law will presume that she entered as guar-
 “ dian to her son the moment he was born, and
 “ nothing appears to the contrary, upon the facts
 “ stated in the case. She was in, without any decla-
 “ ration how she was in; and acts, without any
 “ words, amount in law to an entry; for acts with-
 “ out words may make an entry, but words without
 “ an act (viz. entry into the lands, &c.) cannot make 1 Inst. 245 b.
 “ an entry.

“ It was objected, that the mother being in one
 “ house, and receiving the rents of others, was a
 “ disseisor, or that it was in the daughters to make it
 “ disseisin, *Cro. Car.* 303. and that, if one enters as
 “ guardian who is not so, he is a disseisor. 1 *Roll.*
 “ *Ab.* 662. (J.) *Pl.* 3. in answer to this. The facts in
 “ this case are, that the mother continued in possession
 “ from the death of her husband, received the rents
 “ under leases; her possession was general; it does
 “ not appear that she ousted the daughters, or made
 “ any actual or particular claim; she might continue
 “ in the house by quarentine, which continued until
 “ the son was born; and the entry of one is the entry
 “ of others, who have a right to enter. 1 *Roll. Ab.*
 “ 740, 741. If guardian by nature make a lease by
 “ indenture to one, being under the title of the in-
 “ fant, rendering rent to himself, which is paid ac-
 “ cordingly, yet this is not any disseisin to the infant.
 “ 1 *Roll. Ab.* 659. pl. 13.

“ It

“ It is to be observed, that the title of the
 “ daughters expired on the birth of the son, before
 “ any election, to make the mother a disseisor, was
 “ made; that the law will not presume a wrong:
 “ there never was any determination, that the mo-
 “ ther’s entry or possession was by wrong, in a case
 “ like this: and it is impossible to suppose, in this case,
 “ that the whole rents and profits of the premises in
 “ question were not applied by the mother to the
 “ common use of her daughters, herself, and the
 “ infant son; indeed, if the mother had entered as
 “ guardian to the daughters, she not being their
 “ guardian, it would have been a disseisin; so, if she
 “ had entered for her dower, when it was not assigned
 “ to her. The possession of the mother and daughters
 “ was the possession of the daughters; and, when the
 “ son was born, the estate was divested out of the
 “ daughters, and not before: then the son was in
 “ actual possession and seisin of the premises by his
 “ mother; who had a right to the possession, as being
 “ his guardian by law, (namely) the person next of
 “ blood, to whom the inheritance cannot descend:
 “ her possession was the possession of the son,
 “ 3 *Rep.* 42. *Moore* 125. A guardian need not be
 “ assigned. The seisin of a guardian of a son by the
 “ second venter shall oust the daughters of the first
 “ venter. 8 *Affise* 6.

“ Upon the whole we are all of opinion, that the
 “ premises in question belong to the lessor of the plain-
 “ tiff; and therefore we give judgement for the
 “ plaintiff.”

§ 75. An entry by a mother, as guardian in focage, will give a sufficient seisin to an infant, to exclude the heir of the half blood.

76. A person died, leaving two daughters by different venters: the mother entered as guardian in focage and received the profits. The question was, whether this gave such a seisin to the daughters, that, on the death of one of them, the other could not inherit from her. It was contended, 1st, That the entry of the mother as guardian in focage, and her receipt of the profits, amounted to a sufficient seisin for her daughter, and that this point was sufficiently established by the case of *Goodtitle v. Newman*. 2d, That the seisin of one coparcener was the seisin to the other, and the entry of one is in law the entry of the other. *Lit.* § 396. Where two claim by the same title, as two sons from their father, and the youngest son enters, the law will presume that his entry was not to gain a possession distinct from his elder brother, but merely to preserve the estate from a stranger, and therefore though the younger son dies seised, and his issue enters by descent, yet the entry of the elder brother or his heir is not therefore taken away. And if the law put so favourable a construction in that case where the younger son cannot have any claim for himself, *a fortiori* such a presumption should be made in the case of coparceners, who make but one heir, and so it was stated in *Co. Lit.* 243 *b.* that where one coparcener enters generally and takes the profits, this shall be accounted in law the entry of both, and no divesting of the moiety of her sister.

Doe v. Keen,
7 Term Rep.
386.

Tit. 19. f. 7.

It was argued on the other side that there was no seisin in fact by the eldest sister, but at most a seisin in law, and the court would not incline to extend the operation of the rule excluding the succession of the half blood, beyond the strict letter of it.

Lord *Kenyon* said, “ Nothing can be clearer, than “ that an infant may consider whoever enters on his “ estate, as entering for his use.”—Resolved, that the surviving sister did not take by descent, but the lands should go to the heir of the whole blood of the sister who died.

Trusts descend to the whole Blood.
1 Inst. 14 *b.*
Dyer 10 *b.*

§ 77. Before the statute of uses, it was held that there might be a *possessio fratris* of a use. And therefore where *cestui que use* had issue a son and a daughter by one venter, and a son by another venter, and died, the eldest son took the profits, and died without issue; it was held that the use should descend to the daughter, as sister and heir to her brother; and not to the younger son.

The doctrine of half blood is now applied to trusts as fully as to legal estates.

Advowsons, Tithes, &c.
1 Inst. 15 *b.*
3 Rep. 41 *b.*

§ 78. Advowsons, tithes, and rents, descend to the whole blood; but there must be an actual seisin by presentation to the church, or receipt of the tithes or rents, to make a *possessio fratris*; so that if the eldest son dies before the church becomes vacant, or any receipt of tithes or rent, his brother of the half blood will inherit, as heir to his father; who was the person last seised.

§ 79. Thus

§ 79. Thus if a man seized of an advowson in gross hath issue a son and a daughter by one venter and a son by another and dies, and the eldest son dies before any presentation, the youngest brother shall have the advowson; because the elder never had any seisin thereof.

1 Roll Ab.
628. pl. 10.

§ 80. But if the eldest had presented, and died without issue, the youngest brother should not have had the advowson, because the presentation put the seisin in him.

Idem pl. 11.

§ 81. If two daughters by several venters make partition of an advowson in gross to present by turns, and after one dies without issue before any presentation, the other shall have the advowson, because there was no seisin thereof.—But it would have been otherwise if she that died had presented after partition.

Idem pl. 12,
13.

§ 82. Lord Coke says, the doctrine of half blood extends to offices, courts, liberties, franchises, and commons of inheritance.

1 Inst. 15 b.

§ 83. A right to an estate in remainder or reversion will not exclude the half blood; of which an account will be given in the next chapter.

§ 84. The seventh and last canon or rule of descent is,—“ That in collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, how ever remote, shall be admitted before those from

7th Canon.
The Male
Stocks preferred.

“ the blood of the female, however near) unless
 “ where the lands have in fact descended from a
 “ female.”

2 Comm. 235. § 85. Sir *William Blackstone* observes that this rule was established in order to effectuate and carry into execution the fifth rule or principal canon of collateral inheritance, that every heir must be of the blood of the first purchaser. For when such purchaser was not easily to be discovered, after a long course of descents, the lawyers not only endeavoured to investigate him by taking the next relation of the whole blood to the person last in possession, but also considering that a preference had been given to males by virtue of the second canon, through the whole course of lineal descent, from the first purchaser, to the present time, they judged it more likely that the lands should have descended to the last tenant, from his male, than from his female ancestors.

Mode of tracing an Heir at Law.

§ 86. After a due consideration of the canons or rules of descent already laid down, it will not be a difficult matter to ascertain the party on whom the law casts the inheritance, whenever a comprehensive genealogy shall be made out, of the persons connected in blood with the *propositus*, or party last seized: For there is no title in the *English* law reducible to a more technical system than the title of descent in fee simple. One or the other of two principles only will determine every case of competition on the subject of inheritance at common law; these principles are, 1st, dignity of blood, and 2d, proximity of blood.

§ 87. Lord-

§ 87. Lord *Coke*, in his Commentary on *Littleton*,
 has partly explained in what order the attribute of
 dignity of blood is applied by legal intendment. But
 as the whole subject is susceptible of a compendious
 arrangement, perhaps it may be satisfactory to enu-
 merate the several classes which by physical necessity
 must comprehend every description of kindred; and
 to state the degree of dignity in which they stand to
 the *propositus*.

§ 88. These classes are,

1. The male stock of the paternal line.
2. The female stock of the paternal line.
3. The male branches of the female stock of the paternal line.
4. The female branches of the female stock of the paternal line.
5. The male stock of the maternal line.
6. The female branches of the male stock of the maternal line.
7. The male branches of the female stock of the maternal line.
8. The female branches of the female stock of the maternal line.

§ 89. The reason and progress of this series will on a little consideration appear intelligible. They who trace from the male stock, either in the ascending or

Vide Table
of Descents

descending line, must of necessity trace from a person bearing the name of *Stiles*, whether it be *John*, *Geoffry*, *George*, *Walter*, or *Richard*; and *Stiles* being the family name, they are all entitled to the first rank of dignity. When these are exhausted recourse is to be had to those female stocks who have intermarried with the males of the name of *Stiles*, and have contributed to the blood of the paternal line; such as *Cecilia Kempe*, *Christian Smith*, and *Ann Godfrey*, who constitute the second class. Every female having so intermarried, at how remote soever a period, is deemed to be a stock of the same class, and all those of the same class are held to be equal in point of dignity. It is further to be observed that each stock in the ascending line is successively to be exhausted, first in its male, and then in its female branches, before we proceed to the next immediate female stock, for reasons hereafter to be assigned; and this doctrine gives rise to the third and fourth classes, namely the male branches of the female stock of the paternal, and the female branches of the female stock of the paternal line. The same gradation takes place in the maternal line, and gives rise to the subsequent, or 5, 6, 7, and 8 classes, on the same ground as in the paternal line, and therefore it is unnecessary to repeat them.

Thus far in explanation of the first principle.

§ 90. The second principle, or that of proximity of blood, is twofold; it is either positive, or representative. It is positive when parties claim in their own individual

individual right, as between the second and third son, or between the uncle and grand uncle. It is representative when either of the parties claims as being lineally descended from another; in which case he is entitled to the degree of proximity of his ancestor. Thus the grandson of the eldest son of the *propositus* is entitled before the second son of the *propositus*, though, in common acceptance, nearer by two degrees; and the principle of representative proximity is by the law of *England* so peremptory, that a female may avail herself thereof to the exclusion of a male claiming in his own right; for in descents in fee simple the daughter of the eldest son shall succeed in preference to the second son.

§ 91. Having thus explained the nature of these two principles, we proceed to observe that the first principle, namely, that of dignity of blood, is positive, and operates on all occasions, without reference to any other principle, where it can be shewn that the claimants are unequal in point of dignity of blood, and that they range under different classes of the series as above stated. In all such cases the inheritance will vest, by act of law, in the worthiest of blood. Thus if, according to the table of descents annexed, a competition should arise between the issue of *Andrew* and *Esther Baker*, and the issue of *Richard* and *Ann Stiles*, although the former represent an uncle and the latter a great great uncle, the latter shall prevail, because he is of the first class of dignity, whereas the former falls under the fifth.

§ 92. But when the claimants range under the same class of dignity, the first principle is inert, recourse must then be had to the second, namely that of proximity: and the claimant shall be preferred in respect of the proximity of the stock through which he claims to the *propositus*.

§ 93. Thus in a question between the issue of *Luke* and *Frances Kempe*, and the issue of *William* and *Jane Smith*, in the table annexed, the parties are equal in point of dignity, for they represent female stocks of the paternal line: but in regard to proximity *Cecilia Kempe* the mother of the father, is a nearer stock to the *propositus* than *Christian Smith* the mother of the grandfather, and therefore her representatives shall succeed,

§ 94. It will be apparent to every person, having thoroughly digested the above system, that it is applicable to any case that can be put on the subject of descent. The clearness and certainty of the common law on this head has been long since remarked by Lord *Coke* in his Preface to the second part of his Reports—
 “ In all my time I have not known two questions
 “ made of the right of descents by the common law,
 “ so certain and sure the rules thereof be.”

Observations
on Black-
stone's Doc-
trine of De-
scents.

§ 95. The chief point of difficulty that has occurred has been owing to the want of due attention to the doctrine of representative proximity, which, as is justly observed by Lord *Hale*,—“ through all the degrees of succession by the right of representation,
 “ the

“ the right of proximity is transferred from the root
 “ to the branches, and gives them the same prefer-
 “ ence as the next and worthiest of blood.” In the
 descending line this doctrine is sufficiently familiar and
 obvious; but in the ascending line it is not equally
 familiar, nor has it recently been duly explained. For
 although by the law of *England* the principle of re-
 presentative proximity is equally applicable in the one
 line as in the other, yet in a table of descents affixed
 to a work of deservedly great celebrity, the doctrine
 has been rejected, and a different system has been
 adopted.

§ 96. The work alluded to is that popular treatise,
 the Commentaries on the Laws of *England* by Sir
William Blackstone, in which, after mature and repeat-
 ed deliberation, he persisted in a system repugnant to
 the law of descents, as it had stood and continued in
England for upwards of five centuries; and had been
 successively expounded by Lord *Hale*, Lord Chief
 Baron *Gilbert*, and the ablest writers on the subject.

Now as the Commentaries are justly supposed to
 contain the pure elements of the *English* law, and as
 the learned author has entered into an elaborate dis-
 cussion of the question, it may be presumed that the
 rising generation will admit the validity of his reasons
 without further enquiry, and that his system will be
 generally adopted. But as we do not concur with the
 learned commentator, we deem it a mark of respect
 due to his reputation, to consider the reasons assigned
 by him in support of his opinion, and at the same time
 to

to state the authorities which have induced us to pursue a different course of preference in the table of descents annexed to this chapter.

§ 97. The doctrine which gave rise to the discussion was stated from the bench by Mr. Justice *Manwode*, in the case of *Clere v. Brooke*, as reported by *Plowden*, 442. The question in that case was, whether the heir of the father's mother, or the heir of the mother, were the right heir to the son. The court were unanimous for the former, on account of the dignity of blood of the paternal line.

Justice *Manwode* having answered some objections to this decision, observed that,—“ where they (the competitors) are equally worthy in blood, then the nearest shall be preferred; as if the purchaser die without issue, and the brother of the purchaser's father claim, and the brother of the purchaser's grandfather, that is to say, the brother of the father of the purchaser's father also claims the land, and the brother of the purchaser's great-grandfather, that is to say on the part of the father in the lineal ascent of males, also claims the land, then the brother of the purchaser's father shall be preferred as heir, for he is nearest of the blood of the purchaser's father, and they are all equally worthy in blood, for they are all of the blood of males, which is the more worthy sex, and therefore the nearest shall be preferred as heir. And, if there is no such brother of the purchaser's father, nor any issue of such brother, nor any sister of the
“ purchaser's

“ purchaser’s father, nor any issue of her (for the
 “ sister shall be in the same degree as the brother,
 “ where there is no brother); then the brother of the
 “ purchaser’s grandfather, or his issue, or the sister
 “ of the purchaser’s grandfather, or her issue, shall
 “ be preferred before the brother or sister of the pur-
 “ chafer’s great-grandfather, and their issues, and so
 “ on from them *in infinitum*. And so the brother or
 “ sister of the purchaser’s grandmother, viz. the mo-
 “ ther of the purchaser’s father, shall be preferred be-
 “ fore the brother or sister of the purchaser’s great-
 “ grandmother, viz. mother of the purchaser’s father’s
 “ father, because they are equally worthy in blood, for
 “ such heirs come from the blood of the female sex, from
 “ which the purchaser’s father issued; and, where
 “ they are equally worthy, the next of blood shall al-
 “ ways be preferred as heir.”

To this doctrine Mr. Justice *Blackstone* objects, and has declared his opinion, that the heir of the *besailes* or great grandmother on the part of the father, ought to be preferred to the heirs of the *ailles* or grandmother on the same side. Accordingly, in the table of descents annexed to the second volume of the *Commentaries*, he hath preferred the former, whom he distinguishes by N^o 10, to the latter or N^o 11, for the following reasons :

1st, “ Because this point was not the principal
 “ question in the case of *Clerc and Brook*, but the
 “ law concerning it is delivered *obiter* only, and in the
 “ course of argument, by Justice *Manwoode*; though
 “ afterwards

“ afterwards said to be confirmed by the three other
 “ Justices in separate extrajudicial conferences with
 “ the reporter.”

2d, “ Because the Chief Justice *Dyer*, in reporting
 “ the resolution of the court in what seems to be the
 “ same case (*Dyer* 314.), takes no notice of this
 “ doctrine.”

3d, “ Because it appears from *Plowden’s* report,
 “ that very many gentlemen of the law were dissatis-
 “ fied with the position of Justice *Manwode*.”

4thly, “ Because the position itself destroys the
 “ otherwise entire and regular symmetry of our legal
 “ course of descents, as is manifest by inspecting the
 “ table, and destroys that constant preference of the
 “ male stocks in the law of inheritance, for which an
 “ additional reason is before given, beside the mere
 “ dignity of blood.”

5th, “ Because it introduces all that uncertainty
 “ and contradiction, pointed out by an ingenious
 “ author, (*Law of Inheritances*, 2d Ed. pp. 30. 38.
 “ 61, 62. 66.) and establishes a collateral doctrine
 “ incompatible with the principal point resolved in the
 “ case of *Clerc* and *Brook*, viz. the preference of
 “ N^o 11 to N^o 14. And, though that learned writer
 “ proposes to rescind the principal point then resolved
 “ in order to clear this difficulty, it is apprehended
 “ that the difficulty may be better cleared by rejecting
 “ the

“ the collateral doctrine, which was never yet resolved at all.”

6th, “ Because, by the reason that is given for this doctrine in *Plowden*, *Bacon*, and *Hale*, (*viz.* that, in any degree paramount, the first law respecteth proximity and not dignity of blood) N^o 18 ought also to be preferred to N^o 16, which is contrary to the 8th rule laid down by *Hale* himself. (*Hist. C. L.* 247.)”

7th, “ Because this position seems to contradict the allowed doctrine of Sir *Edward Coke*, (*Co. Lit.* 12.) who lays it down under different names, that the blood of the *Kempes* (alias *Sandies*) shall not inherit, till the blood of the *Stiles* (alias *Fairfields*) fail. Now, the blood of the *Stiles*’s does certainly not fail, till both N^o 9 and N^o 10 are extinct. Wherefore N^o 11, being the blood of the *Kempes*, ought not to inherit till then.”

8th, “ Because, in the case, *M. 12 Edward 4.* 14. (*Fitz. Ab. tit. Descent*, 2. *Bro. Ab. tit. Descent*, 38.) much relied on in that case of *Clere* and *Brook*, it is laid down as a rule, that *cestuy que doit inheriter al pere doit inheriter al fits*. And so Sir *Matthew Hale* says, (*Hist. C. L.* 243.) that, though the law excludes the father from inheriting, yet it substitutes and directs the descent as it should have been, had the father inherited. Now, it is settled by the resolution in *Clere* and *Brook*, that N^o 10 should have inherited to *Geoffrey Stiles* the father before N^o 11,
“ and

“ and therefore No. 11 ought to be preferred in
 “ inheriting to *John Stiles* the son.”

§ 98. To these reasons full and satisfactory answers appear to us to have been given in a tract entitled,—
 “ Remarks on the laws of descents, and on the reasons assigned by Mr. Justice *Blackstone* for rejecting
 “ in his table of descent a point of doctrine laid down
 “ in *Plowden*, Lord *Bacon*, and *Hale*,”—published in 1779.* And therefore the substance of those remarks shall, for the satisfaction of the student, be here stated.

§ 99. On the first of Sir *William Blackstone's* reasons the author observes, “ that the three introductory reasons are merely speculative, they are rather preliminary observations than arguments from principle ; of course the remarks must be of the same nature :—as nothing positive can be determined from either, the reader will judge which has the best grounds for presumption.

“ It is admitted, that the present point was not the principal question in the case of *Clerc* and *Brook* ; however, as this doctrine was laid down by a judge sitting in court, and delivered in his judicial capacity, some respect is due to his sentiments. And, though it may not be allowed that the law, delivered *obiter* in the present case, was founded on the same substantial reasons which led to the final judgment ; still he will not contend that, because it was delivered *obiter*, it was therefore less reasonable ; or, because it was said

* By *William Osgood*, Esq. of *Lincoln's-Inn*.

to be confirmed by the three other justices, that it was not their opinion, or that it was a bad opinion."

On the second reason, he remarks, that "the report of Sir *James Dyer* is extremely short: for the court were unanimous in their resolution. But, as he hath not given the distinct opinion at large of any of the bench, even to the point before them, can we reasonably expect him to take notice of any collateral matter? If we wish to hear the arguments, *Plowden* hath reported them. If we are not satisfied, whither can we refer ourselves? May it not hitherto be said, *Est ridiculum ad ea quæ habemus nihil dicere, querere quæ habere non possumus?* Thus stands the fact. *Plowden* gives a comprehensive report of the case, and the doctrine laid down, when the court gave their opinion. *Dyer* reports the judgment with a brief state of the question, but takes no notice of this, nor any other doctrine. So far then the one is positive, the other neutral. Are we now to discredit the representations of the former, and conclude, from the silence of the latter, by an argument made up of incredulity and uncertainty, to reject the only testimony given, and extort evidence from a nullity? This were to support a cause in the most effectual manner. From *Plowden* it appears, that the Chief Justice was present when *Manwoode* delivered this as law. What, then, can we infer from his silence, except his consent?"

Dyer 314.

Pro Archiâ.

To the third he replies, that "the account, given by *Plowden*, is thus subjoined in a note to the report of the case. "Note, in the case before put, where
" the

“ the purchaser in fee dies without issue, and the brother of the grandmother on the part of the father claims the land as heir, and the brother of the great-grandmother also on the part of the father claims the land as heir, many were of opinion, because there was no nearer heir of the male line, the brother of the grandmother should not be preferred as Justice *Manwoode* had said, but that the brother of the great-grandmother should be adjudged heir, for his blood is derived to the purchaser by two males, viz. by his father and grandfather; whereas the blood of the brother of the grandmother is derived to the purchaser but by one male, and the grandfather was not of the blood of the brother of the grandmother, but he was of the blood of the brother of the great-grandmother, and therefore such blood is more worthy. And upon this I put the question again to *Manwoode* in the presence of *Harper*, another of the justices of the common bench, both of whom held clearly that the brother of the grandmother should be heir to the purchaser, and not the brother of the great-grandmother, because the former is nearer in blood to the purchaser on the part of his father, which proximity holds place on the part of females conjoined by marriage to males, when such blood is once derived by a male to the first purchaser. And another day I put the same question to *Mounson*, puisne judge of the same bench, and he was of the same opinion with the other justices for the same cause; and, at another time afterwards, I put the same question to the Lord *Dyer*, who was of the same opinion also; so

2

“ that

“ that all the justices of the common bench unanimously agreed in the same case, that the brother of the purchaser’s grandmother, on the part of the father, should be preferred before the brother of the purchaser’s great-grandmother on the part of the father.”

Thus the same report, which tells us that many held a different opinion, tells us likewise, that this position of Justice *Manwoode* was confirmed by Justice *Harper*, Justice *Mounson*, and Lord Chief Justice *Dyer*. Therefore, when Lord *Bacon* and *Hale* adopted this position, they had the unanimous authority of the Bench to support it: when the author of the Commentaries disallowed this position, he was justified by the scruples of many by-standers to reject it. It remains to be enquired, who has been guided by the most sufficient reasons. The authority must surely preponderate with us.

On the fourth reason he observes, that “ it may be a matter of surprize, that the first pointed argument against Justice *Manwoode*’s position should be brought from a topic, so irrelative as that of symmetry: for law is the object of reason, not the subject of delineation. The laws of descent are regulated by the analogy of their principles, not by the symmetry of a table; and, when a system of inheritance is established, little attention is paid to the appearance it may make in a scheme of genealogy. Being therefore confident, and meaning to prove, that our doctrine is founded upon legal principles, we are not careful in the first

instance for the subordinate concern of symmetry. And in this spirit, admitting for a moment that our position destroys the regularity of the table, we mean to defend it on the strong ground of consistency. For, if we cannot unite both qualities, if a sacrifice must be made; which shall we surrender? the congruity of our principles, or the symmetry of their delineation? If the eye be offended by irregularity; to avoid this, shall we disgust the mind by incongruity? Can we hesitate which to give up, the reality or the representation, the substance or the shadow? Those remarks might be made, if the learned author meant to apply the absolute idea of symmetry, and to require the same in the draught of a course of descent. But it may be urged, he hath guarded against the pertness of such interrogatories, by specifying the symmetry of the legal course of descents, which must be relative. In such case, before we can confess, deny, or retort the charge, we must acquaint ourselves with the nature of the thing destroyed; and in what manner it is connected with the subject."

"The legal course of descent is chalked out by the laws of inheritance: the symmetry of which course arises from a due exemplification of those laws, agreeably to the principles thereof. And it is constituted by, and can only exist so long as the course of descents conforms itself to, the legal principles of inheritance. The idea of symmetry is conceived, and regulated by such conformity, in which sense it is altogether relative. In short, the entire and regular symmetry of the legal course of descents is nothing
more

more than that order, which is observable in a praxis of those principles, whereby the course is directed."

" Thus, the legal symmetry of the table will finally resolve itself into a conformity to the principles of descent, to which an appeal is more direct than to the medium of delineation. For if, by any position, one of the principles of descent is violated; by the same will this symmetry be also destroyed."

" Let us then compare the position of *Manwoode* with the principles above stated; and we shall discover whether the charge contained in this fourth reason be well founded."

" The doctrine laid down by *Manwoode* is, that where all the branches or descendants of the male stock are extinct, the brother or sister of the mother of the purchaser's father, or N° 11, shall inherit and be preferred before the brother or sister of the purchaser's great-grandmother, or N° 10, for whom Mr. Justice *Blackstone* contends."

" First, in point of *dignity* of blood, the claimants are equal, they represent female stocks of the paternal line; therefore, upon that ground merely, the one cannot be preferred to the other; but

" Secondly, in point of proximity, it is obvious that the grandmother, or N° 11, is nearer to the person last seized than the great-grandmother, or N° 10; on which account the representatives of the former are preferred by Justice *Manwoode*."

“ It follows then, that this position, being supported by the principles of inheritance, cannot destroy that regular symmetry, which arises from a conformity to those *very* principles.

“ On the contrary, let a person, having a distinct and perfect conception of the several classes of dignity, with the notion of proximity superadded, view the table; he will trace from the propositus, and expect that, when one class is exhausted, the number denoting immediate preference will be affixed to the nearest claimant of the ensuing class. For instance, in the male stock of the paternal line ascending, he will find the inheritance regularly given to the nearest representative, first to the uncles and aunts, or N° 7, then to the great-uncles and aunts or N° 8, and so on till the class is exhaust; but, when he comes to the second class, or female stocks of the paternal line, he will revolt at the preference given to the more remote from the propositus, and contend that the legal course of descents is destroyed in that instance; and that the violation thereof is increased by the contrast with the maternal line, where due regard is paid to proximity, and the regular order preserved.”

“ The second clause of this fourth reason contains a charge, which reduces us to the necessity of enquiring whether the matter be rightly understood between us? Whether we are agreed upon terms? Otherwise, in what manner can this position “ destroy the constant preference of male stocks,” when, by the question, they and their descendants are extinct? For,
were

were there any male stocks, or their representatives, surviving, they would certainly succeed; and there would be no contest between the present competitors. If N° 11 be appointed immediately after N° 9, it will certainly destroy the preference of N° 10. But, does N° 10, being the representative of *Christian Smith*, represent a male stock? In fact, what possible pretensions can either of the claimants have? That both are of the paternal line is granted; but, it is evident that the brothers and sisters of *Cecilia Kempe*, and *Christian Smith*, are the representatives of female stocks: and, be the preference given to either, surely the “preference of the male stocks” cannot be destroyed thereby. For, as the question is fairly stated by a learned Chief Baron, “the blood of the father’s mother was preferred to the blood of his grandmother, being both female bloods, and both coming under the consideration of ancient tenants, the nearer tenant’s blood was preferred to the more remote.”

Gilb. Ten.
19.

“But, if it be contended, that the blood of *Christian Smith* may be traced through the male stocks of the paternal line, it is granted. But, may not the blood of *Cecilia Kempe* be traced through a male stock to the propositus likewise? And, as *Harper* says, “proximity holds place on the part of females, “conjoined by marriage to males, when such blood is once derived by a male to the first purchaser.” And such connection with the paternal line is the avowed reason of the preference. *Le frere le ailes sera heir al purchasour, et nemy le frere le befailes, pureeo que il est plus prochein en sanke al purchasour*

Plowden 450

del part de sa pere. The laws of *England* do certainly prefer the descendants from the male and female stocks of the paternal line: and, should any system overlook this distinction, it would be no difficult matter to contravert it. But, in the present case, we have nothing to apprehend from that objection, nor “from

- 2 Comm. 228. “ the additional reason before given: for, what is it? “ The argument of probability, the reasonable proof “ required by the law, that the claimant be *next* of “ the whole blood to the person *last* in possession, (or “ derived from the same couple of ancestors,) which “ will probably answer the same end, as if he could “ trace his pedigree in a direct line from the first purchaser.” Now, who are the next couple of ancestors, who have issue, and in whose favour the argument of probability ought to weigh? The answer is, *Luke* and *Francis Kempe*; from whom the person last in possession, and N^o 11, are both lineally descended. Nevertheless, the author of the Commentaries contends for the issue of *William* and *Jane Smith*, a more remote couple of ancestors; not recollecting his observation, that “ the higher the common “ stock is removed, the more will even the probability decrease.”

On the fifth reason he remarks that, “ when the reader shall be made acquainted with the nature of these uncertainties and contradictions, it will be a matter of surprize, that a learned man should suggest them; and of still greater surprize, that a really learned man should repeat them. In the first place, it will be manifest by consulting the work of the ingenious

out

ous author quoted, that the charge of all those uncertainties and contradictions is brought against the first grand principle of the laws of inheritance; and therefore this charge, even if it were valid, is not to be pointed against any particular application of the principle, but against its general application. Hence it is equally to be brought against Justice *Blackstone's* position, as against that of *Manwoode's*."

Law of Inh.
30.

" The charge is this:—" Here I would raise a
 " quere, or dubitatur, whether the descendants from
 " the collateral ancestors of the *several* classes, (or
 " N^o 10, 11, 12, 13,) are inheritable or not, before
 " the mother's brother (or N^o 14.) And, in my
 " opinion, the doctrine seems, either way, chargeable
 " with some repugnance: for, on the one hand, if
 " they are to be preferred to the mother's brother (as
 " I conceive the law is) then it directly impugns and
 " impeaches the rule, which gives the inheritance
 " *ratione proximitatis* to the brother or sisters of the
 " paternal grandmother or (N^o 11.) in preference to
 " the brothers or sisters of the maternal aunt of the
 " grandfather, or (N^o 10.) on this foundation as it is
 " alledged; because *proxima non remota causa in*
 " *jure spectatur*: and, if the descendants from the
 " collateral ancestors are not to be preferred to
 " the mother's brother but to be totally excluded,
 " this would be absurd; forasmuch as then the pater-
 " nal uncles and aunts of the mother, and the grand-
 " mother of the paternal line should not be capable
 " of inheriting, when the descendants from the bro-
 " thers and sisters of the remotest feme, in the direct

“ line, are held to be inheritable.”—That is to say, it is inconsistent, that the principle of proximity shall take place between the claimants N° 10, 11, 12, 13, and not between them and N° 14, which represents the mother’s brother, and is certainly nearer than any of the classes above mentioned. Now, the reader sees that, for want of a discretive judgment to discover that the said several classes of collateral ancestors, though more remote than N° 14, yet they are of the paternal line; the ingenious author cited hath perplexed the question by applying the test of proximity between them and the mother’s brother, who is of the maternal line, and consequently shall not inherit till the paternal line be exhausted. Whereas that test should never be applied, but where the parties are equal in point of dignity. Let it be further observed, that this charge, futile as it is, is not brought particularly against N° 11, the class for which we contend, but against the *several classes* represented by N° 10, 11, 12, 13. It is not brought specifically against Justice *Manwode*’s position, as this fifth reason would insinuate, but against “ the descendants of “ the collateral ancestors of the higher classes;” among others comprehending N° 10, the class for which Mr. Justice *Blackstone* contends. Does it not then argue a great degree of partiality, when a general objection is brought (good or bad no matter) not to regard our own case, but to enforce it against another, which, by confession, is in the same predicament? Yet the author of the *Commentaries*, whose own position, as favouring the more remote claimant, is most obnoxious to this censure, disregarding his own situation

tion, hath brought the whole weight of the charge on the devoted system of *Manwoode*.

“ If we may avail ourselves of the opinion of this author, where he simply informs us what the law is, (not what it ought to be), we shall find that he concurs with Justice *Manwoode*, and all the elder writers. He puts the case at present in question, and decides it thus : “ If the male stock of the paternal line is totally extinct at the death of the purchaser, then the inheritance will devolve on the heirs of the *father’s mother*, “ or N^o 11 ; and, when they are extinct before entry, “ then it goes to the heirs of the grandfather’s mother,” or N^o 10. Again, he justly censures the reason given in defence of J. *Blackstone’s* opinion, that *more* of the purchaser’s male ancestors have been descended from, and born of, the *femes* in the higher classes. “ If this argument must be allowed to have “ any force at all, it proves too much, and will conclude, if it concludes any thing, for the highest “ class,” or the representatives of *Ann Godfrey*.

Laws of Inh.
30. 61.

“ So far, then, the charges of uncertainty and contradiction, though groundless, were not pointed by the learned writer against one system more than the other. His deliberate opinion supports our argument, and is directly contrary to that of Mr. Justice *Blackstone*.

“ Again, this position is charged with “ establishing a collateral doctrine, incompatible with the principal point resolved in the case of *Clere and Brook*.” If the nature of this collateral doctrine had been pre-

cifely stated, it would have been more satisfactory ; as, then, we might have gone immediately to the point. At present, we will state the only part of the case, which carries (as we conceive) the least appearance of incompatibility.

“ The circumstance, that would most strike a person unacquainted with the principles of descent, is that in the case mentioned, the more remote claimant was preferred ; whereas, at present, we contend for proximity. He is answered, in that case, the more remote claimant was the more worthy in blood, which shall always supersede proximity ; but, in the present case, they are equal in respect of dignity of blood ; in which situation we can only resort to proximity. We do not mean to insult the learned Judge, by proposing this as an objection on his part : it is unworthy of him ; and we have only to lament, that the nature of the charge is such, that we can only make a general defence, by pleading not guilty. To establish this incompatibility, it should be proved, that N^o 10 is more worthy than N^o 11. This hath not been attempted. Therefore, if the reputation of the commentator did not prevent us from making hasty conclusions, we should be well justified in treating this charge as a violent assumption.

“ On our part, it will be sufficient to shew, that the point settled, and the point contended for, do both conform to the principles already stated. In the first instance, the claimant took on account of dignity of blood. In the second, that principle did not operate. N^o 11 ought therefore to take on account of proximity.

mony. We shall not enter further into the detail, as the reader can easily apply both cases to the same system. It will not, then, readily appear, in what manner this position can establish a doctrine, incompatible with the point settled.

“ Till a more direct charge be brought, this, we hope, will be a sufficient vindication : and, now we are upon the subject, we retort the accusation. We say that, in the table of descent, the preference given in the paternal line is incompatible with the preference given in the maternal line. And, as we disapprove of general charges in our own case, it is fitting that the objections we bring should be particular.

“ In the paternal line, *Cecilia Kempe* and *Christian Smith* are female stocks ; and the representatives of the latter, though more remote from the person last seized, are preferred to the former for this reason, because their blood is derived to the person last seized by two males.

“ In the maternal line, *Hannah Willis* and *Susan Bates* stand in the same point of relation with the two above named, the difference of line excepted ; and, though the representatives of *Susan Bates* derive their blood from the person last seized by two males, and are precisely in the same predicament with those of *Christian Smith*, with respect to blood, still they are not preferred in the maternal line, which is incompatible.

“ The fact is, that, in the maternal line, the table of descent is properly delineated : the principles of
dignity

dignity and proximity are invariably pursued throughout. In the paternal line, they are not. No wonder, therefore, that they are incompatible.

Plowd. 449.

To the sixth reason he replies; "It is admitted, that Lord Bacon expresses himself in these direct terms: "*In any degree paramount, the first, the law respecteth proximity and not dignity of blood.*" But, after a tedious search, we could find no such terms nor doctrine in *Plowden*. Perhaps it would be a difficult matter to point it out: though, to discover the opinion really delivered on the occasion, we have only to refer to page 449, where we find in what express terms a doctrine is laid down, altogether contrary to that stated in the reason. "If one claim from the father's mother, and another claim from the great grandfather direct, the latter shall be preferred; *et uncore l' auter est plus prochein del fanche, mes est meins digne de fanche.*"

Hale Hist.
C. L. 271.

"Likewise, after a diligent search, we could find no such doctrine in *Hale*; and, till we are referred to the doctrine we cannot find, we must content ourselves with such information as we can find. His first rule is this: "The law prefers the worthiest of blood. "Those of the male line shall be preferred *usque infinitum*. Again, if the great great great grandfather, or the great great great grandmother of the father has a brother or sister, she shall be preferred, "and exclude the mother's brother, *though he is much nearer.*"

"Thus,

“ Thus, though, from the nature of the thing, we cannot strictly prove, that no such doctrine appears in *Plowden* nor in *Hale*, still we have brought the best possible proof from their own words; whereby, it is evident, they put forth doctrines directly contrary to those suggested. For more satisfactory evidence, we refer the readers to their respective works, which, contrary to the laudable precision our author usually adopts, he hath cited at large without any particular reference. Though we much suspect, that their researches on this head will, like our own, be fruitless.”

If, then, it be allowed, that these opinions do not in anywise appear, it is impossible they should appear as the reasons given for any particular doctrine. But, if the avowed reasons of the doctrine we support be required, *Plowden's* have been stated. Sir *Matthew Hale* says, “ and though it be also true, that the great
 “ grandmother's blood has passed through *more males*
 “ of the father's blood than the blood of the grand-
 “ mother or mother of the father; yet, in this case,
 “ the father's mother's sister shall be preferred before
 “ the father's grandmother's brother, because they are
 “ all in the female line, *viz. cognati*, and not *agnati*;
 “ and the father's mother's sister is nearest, and there-
 “ fore shall have the preference as well as in the male
 “ line ascending, the father's brother or his sister shall
 “ be preferred before the grandfather's brother.”

“ With respect to Lord *Bacon's* position, we shall simply observe, that, as it is totally repugnant to the
 spirit,

spirit of those laws, whence the doctrine of descent originates, so it has been contradicted by every writer on the subject, and is therefore inadmissible. When we recollect the obligations in general science, that are due to this sublime and penetrating genius, let not this mistake be remembered ; when our admiration leads us to consider him as some superior being, even this error may convince us that he was human.

“ Upon the whole, then, it appears that Lord *Bacon* mistook the reason of this doctrine entirely ; and the author of the Commentaries, observing the error, hath unwittingly imputed the same to *Plowden* and *Hale* ; which, being a refutable position, is brought to create an inconsistency in *Hale*’s doctrine. Whereas, the perfection of his system will thereby more forcibly appear, inasmuch as nothing irregular can possibly square with it. How far the multiplicity of learning, our author was obliged to consult, may have occasioned this mistake, we know not ; but are assured that, however his system may be continued, he will not suffer imputed opinions to remain on record against those respectable characters, so contrary to their professed sentiments, and which reduce them to an absurdity.”

On the seventh, he observes, that “ it is an incontrovertible point, that the blood of the *Kempes* shall not inherit, till that of the *Stiles*’s fail. There is likewise no question, whether it fails at N° 9, which bears the name of *Stiles*. But the case is not altogether so obvious with respect to N° 10, notwithstanding that these

these two numbers are coupled together, as if one and the same reason made them similar instances. For, on examination, it will be found, that the name, to which that number is affixed, is *Smith*. However, on tracing upwards, we shall find that, some generations back, the great grandfather of *John Stiles* married a certain *Christian Smith*; who is supposed to have representatives still living. We must, therefore, admit, that a portion of the blood of the person last seized may be traced to N^o 10, or the said *Christian Smith*, as to a female stock of the paternal line, and not, as seems by the reason to be insinuated, as if it were of a degree to be mentioned in point of dignity with N^o 9.

“ It is then admitted, that the blood of *John Stiles* does not fail, while N^o 10 exists.

“ But it will likewise be found, that *George Stiles* the grandfather married *Cecilia Kempe*. Now, according to Sir *Edward Coke*, “ the father hath two “ immediate bloods in him, the blood of his father “ and the blood of his mother, (or *Cecilia Kempe*), “ and both these bloods are of the part of the father.” And, by consulting the table of ancestors in the *Commentaries*, B. 2. c. 14. it will appear, that the *Smiths* contribute one-eighth, and the *Kempes* one-fourth, of the blood of the person last seized; or, to adopt the expression of the ingenious author lately cited, “ the “ grandmother furnishes a double portion of consan- “ guinity, to what the great grandmother does.” It is then evident, that, as the blood of *John Stiles* does not fail, while N^o 10 exists, so, neither, does it fail,

Law of Inh.
62.

while any of the representatives of the grandmother or N° 11 exist.

“ Since this is necessarily the case, how shall we account for the distinction so visible in the text, where the name of *Smith* is omitted, and the number representing it is found in such worshipful society ; whereas great care is taken to inform us, that N° 11, though representing a much nearer relation, is of the blood of the *Kempes*, and therefore to be postponed ?

“ This question we do not undertake to solve.

“ But having discovered, what was unobserved in the present reason, that, when the Name of *Stiles* is no more, still the blood of the paternal line flows in two channels, are we to admit the conclusion which appears so deliberate ; or, are we to advance the neglected N° 11, whose title previously presents itself upon a regular tracing, and, in many other respects, appears to be so justifiable ?

“ If we advert to our author’s own computation so lately mentioned, we shall perceive that the relation, between N° 11 and the person last seized, is much nearer than the relation between N° 10 and the person last seized. However, we shall avail ourselves no farther of this observation, than to presume it is very fair ground, whereon to produce at least the simple claim of N° 11 : the right may be discussed afterwards.

“ The

“ The case of the claimants is such as hath been already stated ; we will apply to a decision from which there will be no appeal.

“ The reader is desired to cast his eye on the table of descents, and to mark in what degree the two competitors stand. The rule to guide his judgment is thus laid down by the author of the *Commentaries*. “ In 2 Comm. 226.
 “ order to ascertain the collateral heir of *John Stiles*,
 “ it is, in the first place, necessary to recur to his ancestors in the first degree ; on default of which, we
 “ must ascend one step higher, to the ancestors in the
 “ second degree ; then to those of the third and
 “ fourth ; and so upwards *in infinitum*, till some ancestors be found, who have other issue descending from
 “ them beside the deceased, in a parallel or collateral
 “ line. From these ancestors the heir of *John Stiles*
 “ must derive his descent ;” as the question is now concerning the collateral heir. In obedience to this rule, let us recur to the first degree ; ancestors there are none living ; to the second, by the question they are extinct. In the third, we find N^o 11, or the representatives of the paternal grandmother. If, for the sake of speculation, we pursue our inquiries, we may find collateral ancestors in the fourth degree, or N^o 10 ; but the inheritance is previously vested, it is cast on N^o 11. Again, in the *Commentaries*, we find this direction :
 “ In order to keep the state of *John Stiles* as nearly as 2 Com. 223.
 “ possible in the line of his purchasing ancestors, it
 “ must descend to ~~the nearest couple of ancestors~~, that
 “ have left descendants behind them.” Those ancestors, who have left descendants, are *Luke Kempe*

and *Frances Holland*, and *William Smith* and *Jane King*. Can it now remain a doubt, which is the nearest couple, or whose issue shall succeed?

“ Such being the case, we cannot possibly admit of the conclusion, “ that N° 11. being the blood of the “ *Kempes*, ought not to inherit till N° 10. is extinct.” For, to retort the distinction so invidiously made in this seventh reason, N° 10. represents the blood of the *Smiths*, and is not descended from so near a couple of ancestors as N° 11, and therefore we are authorized to enquire, why has not their issue the same degree of preference in the table, that we are taught to give them by the text?

With regard to the eighth, he remarks, that “ this reason has a most formidable appearance. The approaches are perfectly regular. Two authorities are brought to establish a point of doctrine; which point is applied to a case resolved, and the inference seems fatal to our system. To make a regular defence, it is our duty to examine, whether the authorities and acknowledged maxims of descent do support such a doctrine; then, whether it is well applied to the case resolved; and whether such inference follows of necessity.

“ The first authority is from the *Year-book, Mich. 12 Edw. 4. 12.* The case, in which the rule was originally introduced, is thus stated. “ Where a man “ purchases land, and dies without issue, and without “ heir on the part of his father, his next heir on the “ part

“ part of his mother shall have the land. And, if a
 “ man purchase land, and hath issue and dies, and the
 “ issue enters and dies without issue, and without heir
 “ on the part of his father, that is to say, on the part
 “ of the father’s male ancestors, that, in such case,
 “ the heir on the part of the mother of his father, that
 “ is to say, of his paternal grandmother, ought to
 “ inherit: *for he, who ought to inherit the father, ought*
 “ *to inherit the son.* Catesby moved, that where the
 “ issue was once seised, that the descent was cast in the
 “ blood of the father; therefore it shall never resort
 “ to the blood of the father’s mother, &c. no more
 “ than where a man purchases lands, and dies without
 “ issue, where, if the land descends to the heir of the
 “ father on account of the dignity of blood, who is
 “ seised and afterwards dies without issue, and without
 “ heir, then the blood on the part of the mother ought
 “ not to inherit: for it is different blood. To which,
 “ it was answered, that the cases are by no means
 “ similar: for, when the inheritance descends to col-
 “ lateral blood, it shall not resort to other blood, &c.
 “ But it was held, that, if a man purchase land and
 “ has issue who takes the land by descent, and after-
 “ wards the issue dies without issue, and without heir
 “ on the part of the father, that the heir on the part
 “ of the son’s mother ought not to inherit: for he is
 “ not of the blood of the first purchaser, that is, he
 “ is not of the blood of the father; but the heir of
 “ the son, on the part of *avies*, that is, of the mother
 “ of the father, ought to inherit, &c. *quod nota.*”

“ Such is the first authority ; and before we make any remarks on the manner in which it is applied, we must express our surprize, that an argument should be drawn from a case, that we might justly cite in support of our own system. For, the question between *Manwoode* and Justice *Blackstone* is this ; when all the representatives of the male stock of the paternal line are extinct, who shall succeed ? The former says, the heir of the *ailles* ; the latter, the heir of the *besailes* : but, what is most singular, to support his argument, an authority is brought, which upon the same question gives the succession to the *ailles* : “ The heir of the “ son, on the part of the *ailles*, ought to inherit.”

“ The next authority to support the point of doctrine is a quotation from Sir *Matthew Hale*. We shall take the liberty of making a larger extract, that by the context the reader may comprehend the full scope of his meaning.

“ If the son purchases land in fee simple and dies
 “ without issue, those of the male line ascending,
 “ *usque ad infinitum*, shall be preferred in the descent
 “ according to their proximity of degree to the son.
 “ And therefore the father’s brothers and sisters, and
 “ their descendants, shall be preferred before the bro-
 “ thers of the grandfather and their descendants ;
 “ and, if the father had no brothers nor sisters, the
 “ grandfather’s brothers and their descendants, and
 “ for want of brothers, his sisters and their descend-
 “ ants, shall be preferred before the brother of the
 great-

“ great-grandfather: for, although by the law of
 “ *England*, the father or grandfather cannot immedi-
 “ ately inherit to the son, yet the direction of the
 “ descent to the collateral ascending line, is as much
 “ as if the father and grandfather had been by law
 “ inheritable, and should have inherited to the son
 “ before the grandfather, and the grandfather before
 “ the great-grandfather, and consequently if the fa-
 “ ther had inherited and died without issue, his eldest
 “ brother and his descendants should have inherited,
 “ before the younger brother and his descendants;
 “ and, if he had no brothers but sisters, the sisters
 “ and their descendants should have inherited before
 “ his uncles, or the grandfather’s brothers and their
 “ descendants; so, though the law of *England* ex-
 “ cludes the father from inheriting, yet it substitutes
 “ and directs the descent, as it should have been,
 “ had the father inherited, viz. it lets in those first,
 “ that are in the next degree to him.”

“ Such is the second authority; and it is presumed
 the reader will be of opinion, that by this detail the
 learned Chief Justice meant to exemplify the doctrine
 of proximity by its several degrees; and to inform us,
 that, though the father, grandfather, and great-grand-
 father cannot immediately inherit, still we must resort
 to them as to the stocks, whence we are to trace proximi-
 tity and primogeniture. And to this rule he hath
 referred the matter at present in question, which he
 hath stated and decided in the following terms.
 “ When the son is once seised, and dies without issue,
 “ his grandmother’s brother (or N^o 11.) is to him

“ heir of the part of his father ; and, being nearer
 “ than his great-grandmother’s brother, is preferred
 “ in the descent.” An opinion, so clear and decisive
 on the question itself, will allow us to pay little regard
 to the construction put on a detached sentence from
 the same authority, in order to support a contrary
 argument. And here we must observe, that, though
 it be allowable, where an author involves himself in
 contradictions, to oppose one part of his doctrine to
 another ; still it is to the last degree uncandid, when
 he is consistent, to force a distinct assertion into the
 service of an argument that he disavows.

“ Upon the whole, we think the citation from
Hale a very full comment on the *dictum* advanced in
 the Year Book. And that the learned author so un-
 derstood the same, is obvious from the following pas-
 2 Comm. 226. sage : “ Now, here it must be observed, that the lineal
 “ ancestors, though (according to the first rule) inca-
 “ pable themselves of succeeding to the estate, because
 “ it is supposed to have already passed them, are yet
 “ the common stocks, from which the next successor
 “ must spring.”

“ Thus then we admit both authorities ; but, what
 is most material, we see on what occasion and to what
 intent they were originally laid down. When there-
 fore they shall be cited to establish a future argument,
 we shall know how far their influence extends ; and,
 knowing to whom the inheritance was given, we may
 judge with what propriety a reference is made thereto.
 But, if these very authorities be advanced for the
 purpose

purpose of giving the inheritance to another, what shall be then said? Shall we not ask, is it candid to adopt a rule and to apply it so as to produce a consequence, totally different from the original conclusion? For it is evident, that the purpose of introducing these authorities was, to collect an inference or point of doctrine therefrom, which, though not delivered in express terms, is nevertheless made and adopted. To have stated it openly would have alarmed the reader; but the doctrine insinuated is, that on account of the rule *cestuy que doit inheriter al pere doit inheriter al fits*, in searching for the heir of the *son*, we ought to trace from the *father*, as from the *propositus*. Reference is then made to the case of *Clere* and *Brook* for reasons, that we shall presently discover. However, in the first place, it is presumed, no such doctrine can be gathered from the authors cited; and we have now to examine whether, if it be a point, it is consistent with the laws of descent.

First, that the learned Commentator, in a former instance, put a much more liberal construction on the *dictum* in the Year Book, may be gathered from the following passage.

“ This, then, is the great and general principle, upon
 “ which the law of collateral inheritances depends;
 “ that, upon failure of issue in the last proprietor,
 “ the estate shall descend to the blood of the first
 “ purchaser; or that it shall result back to the heirs
 “ of the body of that ancestor, from whom it either
 “ really has, or is supposed by fiction of law to have,
 G g 4 “ originally

2 Comm 223

“ originally descended: according to the rule laid
 “ down in the Year Book, *Fitzherbert, Brook*, and
 “ *Hale*, that he, who would have been heir to the
 “ father of the deceased” (*and of course to the mother*
 “ *or any other purchasing ancestor*) “ shall also be heir
 “ to the son.” Now, if any one chose to adopt the
 passage contained in the above parenthesis, in the
 same manner as the *dictum* in the Year Book is, in
 the present case, applied to make the father become
 the *propositus*; it might thereby be proved, that as he,
 who would have been heir to the mother, shall also be
 heir to the son, so therefore the mother ought to
 become the *persona proposita*.

Secondly, in contradiction to this doctrine is the
 approved maxim, *Seisina facit stipitem*; and, “ as the
 2 Comm. 209. “ seisin of any person makes him the root or stock,
 “ from which all future inheritance by right of blood
 “ must be derived,” on the authority of the Com-
 Id. 228; mentaries, which also tell us that “ the law only re-
 “ quires that the claimant be *next* of the whole blood
 “ to the person *last* in possession,” we conclude that
 the son being the person last seised, he shall be the
 root or stock from which such inheritance must be
 derived.

“ Thirdly, if we are to trace from the father, it
 will introduce universal confusion, it will confound
 the distinction made by Sir *Edward Coke* “ that the
 “ father hath two bloods in him, by which means the
 “ father’s mother, though of the female line to him,
 “ is of the male line to the son.” For, if we are to
 trace

trace from the father, his mother must be of the female line to the son; and, what is still more injurious, in such case the whole maternal line will be totally excluded, for there is no privity of blood between the father and the line of the mother.

“ Thus have we endeavoured to prove, that no such point has been nor can be established. We now contend, that the case to which it is applied, the resolution in *Clere* and *Brook*, is indirectly stated. It was there settled, that the heir of *Dorothy Young*, the paternal grandmother of the person last seized, should succeed in preference to *Edward Clere* his mother's brother; that is, N° 11 shall succeed to *John Stiles* the son. Whereas, we are told in the *Commentaries*, who might or *should* have succeeded to *Geoffrey Stiles* the father. That N° 10 should have inherited to *Geoffrey Stiles* the father before N° 11. This may be true, if *John Stiles* the son had never been seized; but, the contrary being the case, there was no question, who should have inherited the father. The matter settled was, that N° 11 should inherit the son. This indirect stating of the case leads us to the reason why the point above mentioned was attempted to be established. It was introduced with a view to discard the son; and that the father should become the *propositus* or *root*, to whom N° 10 is exactly in the same relation as N° 11 is to the son. Now, can there be a more presumptive proof how far the judgment is here sacrificed, than the forced construction put upon different texts in order to establish a point for the purpose of getting rid of the son? For, when once that is effected,

effected, when once we trace from the father, N° 10 will certainly inherit. But, as the fact is otherwise, as the son is the person last seized, shall not N° 11 confessedly succeed?

“ The negative application of the rule is this. Because the issue of *Luke and Frances Kempe*, or N° 11, should not have inherited to the father, *therefore* they shall not inherit to the son. Now it is certain, that not one person of those represented in the table of descents, from N° 14 to N° 20 inclusive, shall ever inherit the father; but who will be found to contend, that therefore not one of them shall inherit the son?

“ However, by virtue of this liberal rule, *John Stiles* is utterly excluded, as though he had never existed; notwithstanding we are told by the author himself that *John Stiles* held the land as a feud of indefinite antiquity. Let us then for a moment admit of the delusion, and refer ourselves to *Geoffrey Stiles* the father. Now, if the heirs of *Christian Smith* shall inherit *John Stiles*, as by the table they do, by parity of reason must not the heir of *Ann Godfrey* succeed to *Geoffrey Stiles*? To hesitate were useless, their respective relation is the same; if the heirs of the great-grandmother shall succeed in one instance, they shall in another, or there is no virtue in consistency. Nevertheless, having once secured *Geoffrey Stiles* as the *propositus*, the system of the table of descents is deserted; and appeal is made to the resolution in *Clere and Brooke*: so that, when Justice *Manwoode* argues rightly from the son, the doctrine is reprehensible; whereas

whereas no scruple is made in tracing from the father, to admit the same arguments.

“ To pursue the proposed plan of defence, we should continue to examine whether such inference follows, as is suggested from the stating of the case resolved. But we are prevented by the express prohibition of our author; who, perhaps not thinking he should ever adopt a contrary opinion, hath in effect told the student that, if any case be put except as from *John Stiles*, he should not admit it. The words are—“ The student should bear in mind that, during 2 Com. 240.
 “ this whole process, *John Stiles* is supposed to have
 “ been last actually seized of the estate: for, if ever
 “ it comes to vest in *any other person* as heir to *John*
 “ *Stiles*, a new order of succession must be observed
 “ upon the death of such heir; since he, by his own
 “ seisin, now becomes an ancestor or *stipes*, and must
 “ be put in the place of *John Stiles*.”

“ Had we previously attended to this admonition, we should have found, that our arguments against the appointment of *George Stiles* the father, as the *stipes*, were needless: for, in such case, a new order of succession must be observed, and the student is forewarned accordingly. Can we, therefore, with any propriety pursue our enquiries respecting the inference, when we are forbidden to admit the proposition?

“ Upon the whole, we presume to have shewn that, of the foregoing reasons, the first, second, and third, are merely speculative; the fourth is drawn from an inapplicable

inapplicable medium, and a charge which is contradicted by the express words of *Plowden*; the fifth depends upon a distorted authority, and violent assumption; the sixth on a misquotation; that the seventh involves a contradiction between the table and the text; and of the eighth it will not be deemed intemperate to say, that it collects a point of doctrine from authorities by which that doctrine is opposed, which point is applied to a case we are directed not to allow; and from which an inference is drawn, though we are enjoined not to admit of the premises."

TITLE XXIX.

DESCENT.

CHAP. IV.

Of the Descent of Estates in Remainder and Reversion.

- | | |
|---|---|
| § 2. <i>Remainders, &c. descend to the Heirs of the Person in whom they first vested.</i> | § 6. <i>A Right to a Remainder does not exclude the Half-Blood.</i>
15. <i>An Act of Ownership operates as a Seisin.</i> |
|---|---|

Section 1.

THE rules laid down in the preceding chapters respecting the descent of estates in possession, do not apply to the descent of estates in remainder and reversion, expectant on an estate of freehold ; because, where there is a preceding estate of freehold, the actual seisin is in the possessor of that estate, and not in the person entitled to the estate in remainder or reversion.

§ 2. It follows, from this principle, that, where a person entitled to an estate in remainder or reversion, expectant upon a freehold, dies during the continuance of the particular estate, the remainder or reversion does not descend to his heir ; because he never had a seisin to render him the stock or *terminus* of an inheritance : but it will descend to the person who is heir to the first purchaser of such remainder or reversion, at the time when it comes into possession.

Remainders, &c. descend to the Heirs of the Person in whom they first vested.

§ 3. Thus,

3 Rep. 42 a.

§ 3. Thus, it was laid down by the Judges in *Ratcliffe's* case, that “ of a reversion or a remainder expectant on an estate for life or in tail, there, he who claims the reversion as heir, ought to make himself heir to him who made the gift, or lease, if the reversion or remainder descend from him. Or, if a man purchase such reversion or remainder, he who claims as heir ought to make himself heir to the first purchaser.”

Vide Tit. 17.
f. 24.

§ 4. In the case of *Kellow v. Rowden*, it was held by all the Judges, that, where an estate for life or in tail is created, and the reversion in fee expectant thereon descends from the donor or settler, through several intermediate heirs, before it falls into possession, every person claiming it by descent must make himself heir to the donor or settler, and take it as such, and not as heir to the intermediate heirs; who need not be so much as named in an action brought against the person so acquiring the possession, as heir to the donor or settler: for the intermediate heirs never had such a seisin as to transmit the reversion from them by descent to any person who was not heir to the donor or settler.

Jenkins v.
Prichard,
2 Will. R. 45.

§ 5. *David Smith*, in consideration of his marriage with *Sarah Madey* in 1716, settled the premises in question to the use of himself and the said *Sarah* during their natural lives, and the life of the survivor of them; remainder to the heirs of the body of the said *Sarah* by the said *David*; remainder to the said *David*, his heirs and assigns for ever.

There

There was issue of the marriage one daughter, named *Elizabeth*, and no other child.

Upon the death of the said *Sarah*, *David Smith* married a second wife, and, by her, had issue *Anne*, the lessor of the plaintiff, and no other child.

Elizabeth, the daughter of the said *David* by *Sarah* his first wife, intermarried with *John Waters*, and, upon that marriage, *David Smith* delivered up the possession of the premises to *John Waters*, but did not execute any conveyance thereof to him.

In 1738, *David Smith* died, leaving issue only *Elizabeth* by his first wife, and *Anne* by his second wife; and about twelve months after, *Elizabeth* died, leaving issue one son, who was born after the death of *David* his grandfather, and died an infant, soon after the death of his mother.

The said *David Smith* had no brother, but left a sister named *Jane*, (who married one *Gilbert*), who was heir at law to *Elizabeth*, the daughter of *David Smith*, by his first wife, and to her son; and upon the death of *John Waters*, *Gilbert* and his wife entered on the Premises.

Anne, the daughter of *David Smith* by his second wife, claimed the estate as heir at law to her father, and brought an ejectment against *Gilbert* and his wife.

2d Edit. 143.
Note (g.)

Serjeant *Wilson* reports the Court to have been of opinion, that *Anne* had no title to the premises. But it is truly observed by Mr. *Watkin's*, in his essay on the Law of Descents, that the judgment is most evidently mistated, or wrongly printed; and that Gentleman states that, in a note of this case taken by Mr. Serjeant *Hewit*, (afterwards Lord Chancellor of *Ireland*). The adjudication is thus given. “ In this case, it “ was clearly agreed, that, by the settlement of 1716, “ *David Smith* was tenant for life, his wife was tenant in “ tail, with the reversion in *David Smith*. And, there- “ upon, this point was made, whether the reversion “ in fee descended upon the two daughters of *David*, “ viz. *Elizabeth* by his first wife, and *Anne* by his “ second wife, in such manner as that, upon the de- “ termination of the estate tail, which descended upon “ *Elizabeth*, and from her upon her son, and expired “ by his death without issue, it should go in moieties, “ viz. one moiety to *Anne*, and the other to the heirs “ of *Elizabeth*; or whether it should not go all to “ *Anne* as heir to her father, who was last actually “ seised of the reversion?”

The Judges were of opinion, “ that though the re- “ version descended upon the two daughters of *David* “ on his death, yet they were not actually seised of “ that reversion, during the continuance of the estate “ tail; but the same was expectant thereon. And as “ whoever takes by descent, must take as heir to him “ who was last actually seised, therefore *Anne* took “ the reversion wholly as heir to her father. And,

“ as to this, 1 *Inst.* 14, 15. and *Kellow v. Rowden* in
 “ *Carthew and Shower*, were held to be authorities
 “ in point.”

§ 6. A right to an estate in remainder or reversion, does not exclude the half-blood. For, where a person having such a right, dies before the estate in remainder or reversion falls into possession, he cannot acquire such a seisin as to become the stock of an inheritance, and, therefore, his heir of the half-blood, if he is heir to the donor or settler of the remainder or reversion, will become entitled to it.

A Right to a
 Remainder
 does not ex-
 clude the
 Half-Blood.

§ 7. If there be a gift to baxon and feme in special tail, remainder to the right heirs of the baron, and they have issue and the feme dies, and the baron takes another feme and hath issue and dies, and the eldest son enters, and dies without issue, the second son of the half-blood shall have the remainder; because the eldest was not seised thereof in his demesne.

1 Roll Ab.
 628. Pl. 6.
 cites 37 Aff.
 4. 24 Ed. 3.
Jenkins v.
Prichard,
Ante f. 5.

Lord Coke has stated this case, and observed, that the rule is, that *possessio fratris de feodo simplici facit sororem esse hæredem*, and here the eldest son was not possessed of the fee simple, but of the estate tail.

1 *Inst.* 14 b.

§ 8. If land be given to *I.* for life; remainder to *R.* his son in tail, remainder to the rights heirs of *I.*, and *I.* dies, and *R.* enters as tenant in tail, and dies without issue, *T.* the son and heir of *I.* of the half-blood to *R.* shall have the land by descent, and not the heir of *R.*, because *R.* was never seised in fee in demesne.

1 Roll Ab.
 628. Pl. 7.
 cites 29 Edw.
 3.

Idem Pl. 8.

§ 9. So, if a gift be made to a person in tail, remainder to his right heirs, and after the donee dies, having issue a son by one venter, and a son by another venter, and the eldest son enters and dies without issue, his brother of the half-blood shall inherit the remainder by descent, because his brother was never seised thereof in demesne.

Idem Pl. 9.
cites 5 & 32
Edw. 3.

§ 10. So, if the eldest son be seised in tail, with a remainder or reversion by descent to him from his father in fee, and dies without issue, his brother of the half-blood shall have the remainder or reversion by descent, because his brother was never seised thereof in demesne.

1 Inst. 15 a.

§ 11. Lord *Coke* says, if a father makes a lease for life, or a gift in tail and dies, and the eldest son dies in the lifetime of the tenant for life, or tenant in tail, the younger son of the half-blood shall inherit the reversion; because the tenant for life or tenant in tail was seised of the freehold, and the eldest son had nothing but the reversion expectant upon that freehold, and therefore the younger son shall inherit the land as heir to his father, who was last seised of the freehold.

Idem, an 1
Note 5.

§ 12. Lord *Coke* also observes, that although a rent had been reserved on the lease for life, and the eldest son had received it, yet it was holden by some, that the younger brother should inherit: because the seisin of the rent was no actual seisin of the freehold of the land,

land; but that 35 *Aff.* pl. 2. seemed to the contrary, because the rent issued out of the land, and was in lieu thereof. But it is said in Lord *Hale's* Notes, published by Mr. *Hargrave*, to have been adjudged in the case of *Piper v. Masters*, *Trin.* 1657, that in such a case feisin of rent did not make a *possessio fratris*.

§ 13. Although the eldest son enters on the death of his father and gets actual possession of the fee simple, yet, if the widow of the father be endowed of a third part, and the eldest son dies in the life-time of the widow, the younger brother of the half-blood will inherit the reversion of the third part, notwithstanding the elder brother's entry; because the actual feisin which he acquired thereby, was defeated by the endowment. 1 Inst. 15 a.
Tit. 6. Ch. 4.
§. 29.

§ 14. Where there are two sons or two daughters by different venters, and a remainder or reversion expectant upon an estate for life is purchased by the father, who dies in the life-time of the tenant for life, and the eldest son or daughter also dies in the life-time of the tenant for life, the half-blood shall inherit; for, in this case, the claim is from the father. Jenk. cent. 6.
Ca. 25.

§ 15. Where the person entitled to a remainder or reversion exercises an act of ownership over it, by granting it for life or in tail, this is deemed equivalent to an actual feisin of an estate, which is capable of being reduced into possession by entry, and will make the person exercising it a new stock or root of inheritance. An Act of
Ownership
operates as a
Seisin.

For an entry being impossible, the alienation of a remainder or reversion for a certain time, is allowed to be sufficient to change the descent; because such alienation being formerly always attended with attornment, was deemed equal, in point of notoriety, to an entry on a descent.

Ante f. 13.

1 Inst. 15 a.
8 Rep. 35 b.

§ 16. Thus Lord *Coke*, after stating the case of a son's endowing his father's widow, says, "But if the eldest son had made a lease for life, and the lessee had endowed the wife of the father, and tenant in dower had died, the daughter should have had the reversion, because the reversion was changed and altered by the lease for life, and the reversion is now expectant on a new estate for life."

Id. 191 b.

In another place, his Lordship says, "for many times the change of the freehold makes an alteration or change of the reversion."

This doctrine has been confirmed by Lord *Hardwicke* in the following case.

Stringer v.
New, 9 Mod.
363.

§ 17. *A.* being tenant for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the heirs of his own body, remainder to the right heirs of his father; had a sister of the half-blood, and also a sister of the whole blood.

A. conveyed the estate to *B.* by lease and release, in trust for payment of debts, and levied a fine thereof.

Lord *Hardwicke*.—The question is, whether *A.* had made any alteration as to the descent of the reversion in fee? if he had not, it would descend to the sister of the half-blood, who was the elder daughter, and equally heir to the father with the other daughter. But if he had altered it, and given it to himself, it would descend to the sister of the whole blood, who claimed as heir to her brother who was last actually seised. But then it is certain that must be an actual possession; so that it is argued in this case, that this being an estate for life in *A.*, with a remainder in tail and a reversion in fee expectant, this is not such a possession as will entitle the younger daughter to take under a *possessio fratris*. What was insisted upon on the other hand, in order to have altered the course of descent, and given it to the heirs of *A.* instead of the heirs of the father, was the conveyance made by *A.* by lease and release and fine; and the question is, whether his fine has changed the reversion in fee, and thereby altered the descent?

His Lordship declared his opinion that it did alter the reversion, and therefore the estate would go to the right heirs of *A.*; and founded his opinion on the two passages stated in a former section from *Coke on Littleton*, 154. and 191 b., from which it appeared, that in consequence of such change in the reversion, it

should descend to the heir of the son, and therefore entitle the younger sister of the whole blood to claim as heir to him, by a *possessio fratris*.

The conveyance was by lease and release to *B.* to pay debts, &c. and surely this was a great alteration, for this amounted to a grant of his estate for life, and it likewise passed the reversion in fee. For as he was right heir of his father, he had a reversion to grant, though it would descend to the right heirs of the father without such an alteration, and though the estate was subject to redemption on payment of the debts, &c. yet it would follow the heirs of the son, because the son had changed it, and made it his own by a plain alteration.

Vide Tit. 35.

His Lordship then said, he should consider what would be the effect of the fine, supposing the lease and release out of the case: that fine would certainly have barred the remainder in tail to himself, for he was seized for life, with remainder to the heirs of his own body; so that the fine barred the estate, and would have amounted to a grant of the reversion in fee, if to a stranger. Now, this reversion in fee, instead of being expectant on the estate tail, as it originally was, does now depend on an estate in contingency. Therefore, on this case, whether the reversion being thus changed should alter the descent of it so as to go to the heirs of the son, his Lordship was clearly of opinion, that it was literally within what was laid down in

in *Co. Lit.* 191 *b.* that if the elder brother change the freehold, it shall alter the reversion likewise, and shall cause a *possessio fratris*. In this case, both the conveyances changed the reversion, and therefore the estate descended to the heir of the whole blood to the brother.

TITLE XXIX.

DESCENT.

CHAP. V.

Of Descent by Statute and Custom.

§ 1. *Descent of Estates tail.*
 6. *No Corruption of Blood.*
 10. *Customary Descents.*

§ 11. *Descent in Gavelkind.*
 16. *Borough English.*
 23. *Descent of Copyholders.*

Section 1.

Descent of
 Estates Tail.

BESIDE the descent of lands in fee simple, there are two other modes of descent, of which it will be proper to give some account.* The first of these is the descent of estates tail, which is regulated by the statute *De Donis Conditionalibus*, and is therefore called descent by statute.

§ 2. The descent of an estate tail resembles that of a *feudum novum*, for the person to whom an estate tail is originally given or limited, is the first purchaser of it; and none but those who are lineally descended from him can make a title to it by descent.

§ 3. In some cases the descent of an estate tail is not only confined to the lineal descendants of the first purchaser or original donee, but is sometimes re-

* The Descent of Dignities has been already discussed in title 26; and the Descent of Estates held by Prescription will be noticed in title 31.

strained to those of the male sex, as in the case of estates in tail male, or to those who are born of a particular woman, as in the case of estates in tail special. Tit. 3. ch. 2. f. 13.

§ 4. The maxim, that *seisina facit stipitem* does not take place in the descent of estates tail. It being only necessary in deriving a title to an estate tail by descent, to deduce the pedigree from the first purchaser, or donee, and not that the claimant is heir to the person last seised. For the issue in tail claim *per formam doni*, that is, they are as much within the view and intention of the donor, and as personally and precisely described in the gift, as any of their ancestors.

§ 5. The exclusion of the half blood does not take place in the descent of estates tail: because the descent from the first purchaser or original donee of an estate tail, must be strictly proved; and where the lineage is thus made out, there is no need of this auxiliary proof: and Lord Coke says, the issue in tail is ever of the whole blood to the donee. And in a modern case Lord Kenyon said—"In the case of estates tail the half blood coming within the description of the entail may inherit as effectually as the whole blood. There the rule of *possessio fratris* does not apply." Lit. f. 14, 15. 3 Rep. 41 b. 1 Inst. 15 b. 8 Term Rep. 213.

§ 6. The doctrine of corruption of blood does not attach in the descent of estates tail; for notwithstanding the forfeiture of lands intailed, by attainder of high treason, yet the blood of the person attainted is not corrupted, so as by any consequential disability to affect the issue in tail, or prevent the descent of an estate tail to him. No Corruption of Blood.

§ 7. Thus

Lumley's
Case cited,
3 Rep. 10 b.
Mantell v.
Mantell,
Cro. Eliz. 28.

§ 7. Thus where there was grandfather, father, and son, and the grandfather was tenant in tail, and the father was attainted of high treason, and died in the life of the grandfather, and afterwards the grandfather died. It was agreed that the land should descend to the son, notwithstanding the attainder of the father; for the father had not the land, neither in possession nor in use, in which two cases the act of 26 Hen. 8. gave the forfeiture only. And his attainder was not any corruption of blood for the land in tail.

Tit. 2. c. 2.
l. 30.

§ 8. The reason upon which this doctrine was founded, was, because the forfeiture of estates tail was created by the statute 26 Hen. 8. But that statute being of a personal kind, the Judges construed it strictly: so that they only extended it to such estates whereof the offender was actually in possession, and which he had power to alienate; but would not construe it so as to bring consequential disabilities on the heir, where the offender was not in possession.

Vide Tit. 26.
l. 137.

Bro. Ab.
Tit. Devise 5.
7 Rep. 8 b.

§ 9. If a tenant in tail dies without issue leaving his wife enſient with a son the donor may enter. But upon the birth of the son, the estate tail is set up again. The issue will not however in this case be entitled to the mesne profits.

Customary
Descents.

§ 10. There are some other modes of descent which are derived from the peculiar custom of particular places: and differ in many respects from the descent by common law. Of these the principal are the descent

Descent of lands held in gavelkind and borough *English*, and by copy of court roll.

§ 11. The descent of lands held in gavelkind in the right line is amongst all the sons, and in default of sons, amongst all the daughters. But although females claiming in their own right are postponed to males, yet they may inherit together with males, by representation; for the right of representation takes place in customary descents, as well as in descents at common law; and therefore if a man has three sons, and purchases lands held in gavelkind, and one of the sons dies in the lifetime of his father leaving a daughter, she shall inherit the part of her father; and yet she is not within the words of the custom, (*inter hæredes masculos partibilis*) for she is no male, but the daughter of a male, coming in his stead by representation.

Descent in
Gavelkind.
Lit. f. 210.
265.
Robin. Gav.
90.

§ 12. The partible quality of lands held in gavelkind is not confined to the right line but is the same in the collateral one. For it has been resolved, that where one brother dies without issue, all the other brethren shall inherit from him, and in default of brothers their respective issue shall take, *jure representationis*; but where the nephews succeed with an uncle, the descent is *per stirpes*, and not *in capita*, and so from the nature of the thing it must be, where the sons of several brothers succeed, no uncle surviving; for though in equal degree, they stand in the place of their respective fathers.

Rob. 92.
1 Inst. 140 a.

§ 13. The

Rob. 94.
Lit. f. 265.
Dyer 179 b.

§ 13. The partible quality of lands held in gavelkind is not confined to estates in fee simple. For although an estate tail is a new kind of inheritance introduced by the statute *de donis conditionalibus*, yet if a person dies seised in tail of gavelkind lands, whether general or special, all the sons shall inherit together as heirs of his body.

Rob. 97.

§ 14. Descendible freeholds are also partible where the lands are held in gavelkind. As if a lease be made of lands of this kind to a man and his heirs, during the life of *A.* and the lessee dies living *A.* the lands will descend to all his sons, as special occupants.

Rob. 99.

§ 15. The exclusion of the half blood takes place in the descent of lands held in gavelkind.

Borough
Englsh.
Lit. f. 165.
Rob. App.

§ 16. With respect to lands held in borough *Englsh*, *Littleton* says, some boroughs have a custom that if a man has issue many sons, and dies, the youngest shall inherit all the tenements which were his father's within the same borough, by force of the custom.

Nelf. Ab.
397. pl. 6.

§ 17. It appears to have been held in 10 Jac. that tithes arising out of lands held in burrough *Englsh* descend to the eldest son. Because tithes do not arise naturally from the land, but by the labour and industry of man. Besides of common right tithes are not inheritances descendible to an heir, but go in succession from one clergyman to another. And though by the statute of dissolution of monasteries they are made descendible to heirs, yet that being within time

of memory the custom of burrough *English* will not prevail in such a case.

§ 18. The right of representation takes place in the descent of lands held in borough *English*. And therefore if the youngest son dies in the lifetime of his father, the children of such youngest son shall inherit the lands.

Clements v.
Scudamore.
Infra.

§ 19. The custom of borough *English* is confined to lineal descents, and does not extend to collateral ones. So that where lands held in borough *English* descended to the youngest son, and he died without issue; it was resolved that they did not go to the younger brother: for the custom did not take place in the descent between brothers; but the eldest brother inherited.

Rob. 93.

Bayly v.
Stevens,
Cro. Jac. 198.

§ 20. Lord *Coke* however says, that by some customs the youngest brother shall inherit. But this extension of borough *English* to the collateral line must be specially pleaded.

1 Inst. 110 b.
n. 3.

§ 21. If lands of the nature of borough *English* be let to a man and his heirs during the life of J. S. and the lessee dies, the youngest son shall have them.

Idem.
1 Salk. 243.
2 Vern. 226.

§ 22. The descent of lands held in gavelkind and borough *English* cannot be altered by any limitation of the parties. And therefore where A. seized in fee of lands held in burrough *English* made a feoffment to the use of himself and the heirs male of his body according

Jenk. Cent.
5. ca. 70.
Dyer 179 b.

according to the course of the common law: the words, “according to the common law” were held void, for customs which go with the land as this one and gavelkind, and fix and order the descent of inheritances, can only be altered by Parliament.

Copyhold,
Tit. 10. ch. 3.
f. 19, 20.

§ 23. Estates held by copy of court roll are in general descendible in the same manner as estates held in socage, though in some manors a different mode of descent is established by custom.

Co. Cop. f.
41.
Gilb. Ten.
162. 287.

§ 24. In case of the descent of a copyhold, the heir becomes tenant of the land, immediately on the death of his ancestor. But still he must be admitted, for until admittance he is not complete tenant to the lord; and therefore cannot be sworn on the homage, or maintain a plaint in the lord's court.

Idem.

§ 25. The heir of a copyholder may, however, enter on the lands before admittance. He may also punish for any trespass done upon the land; surrender into the hands of the lord to any use he pleases, and pay the lord his fine on the descent.

Co. Cop. f.
50.
Taverner v.
Cromwell,
3 Leon. 109.

§ 26. Where a copyhold estate has been derived *ex parte materna*, it shall go to the heirs on the part of the mother, and not to those on the part of the father; unless the copyholder departs with it, and acquires a new estate by purchase.

Doe v.
Morgan,
7 Term R.
103.

§ 27. A person being seised in fee of a copyhold estate which descended to him *ex parte materna*, surrendered

rendered it to the use of himself and his assigns for life, with remainder to the use of such persons, and for such estates, as he should by deed or will direct. He afterwards surrendered it to the use of a mortgagee in fee, and the mortgagee was admitted. The mortgagor paid the mortgage money; and the heir of the mortgagee, who was an infant, by virtue of an order of the Court of Chancery, surrendered the premises into the hands of the lord to the use of the mortgagee, who was admitted.

Lord *Kenyon* held, that this was like a feoffment and re-infeoffment, which, it had long been settled, broke the line of descent, and consequently the heir *ex parte paterna* was entitled to recover.

§ 28. The rule respecting the half blood takes place in the descent of copyholds and the possession which the heir may acquire before admittance is sufficient to establish a *possessio fratris*; and therefore Lord *Coke* says, that if a copyholder in fee has issue a son and a daughter by one venter, and a son by another venter and dies, and the son by the first venter enters into the land, but dies before admittance, the daughter shall inherit as heir to her brother, and not the son by the second venter, as heir to his father.

Co. Cop.
f. 41.
Gilb. Ten.
157.

§ 29. A man tenant in fee of copyhold land, had issue two daughters by different venters, and died seised thereof. The daughters entered and took the profits for several years without any admittance, or taking of it in the court of the lord. The eldest daughter died

Anon. Dyer
291^a. pl. 69.

without issue, and afterwards the youngest was admitted to the whole as sole heir to her father. The question was, whether the next heir of the whole blood to the eldest daughter should have the moiety.

By the opinion of *Welsh* and *Dyer* Justices, the possession aforesaid, without admittance, was sufficient in law to make the collateral heir inheritable. And it was ordered by the Lord Keeper accordingly.

Id. 292 a.

§ 30. A copyholder had issue a daughter by one venter and a son by another venter and died, the son within age. The lord of the manor committed the custody of the land during the nonage to the mother of the son, who entered: and afterwards the son within age died without any admittance of him as heir. And the daughter, who was his sister by the half blood, prayed to be admitted. But by the opinion of *Catlyn* and *Dyer*, to whom the question was referred, she should not be admitted, because the possession of the mother as guardian gave actual possession to the son.

Cop. f. 41.
Gilb. Ten.
158.
Dyer 292 a.
Forder v.
Wade,
4 Bro. R. 520.

§ 31. Lord *Coke* also says the possession of a guardian or termor, without an actual entry or claim made by the heir, will make a *possessio fratris*. And in a modern case the entry of a widow, as guardian to her son, was held to have the effect of obtaining a possession for the son, sufficient to exclude the half blood.

§ 32. It has been laid down that where a lease of a copyhold is made by licence from the Lord, by indenture reserving rent, the possession of the lessee is not the possession of the copyholder.

§ 33. Husband seized in right of his wife of certain customary lands, he and his wife by licence from the lord made a lease for years by indenture rendering rent, and had issue two sons. The husband died, the wife took another husband, and they had issue a son and a daughter. The husband and wife died, the son was admitted to the reversion and died without issue. By *Manwoode* the reversion shall descend to all the daughters notwithstanding the half blood; for the estate for years, which was made by indenture by licence from the lord, was a demise and a lease according to the common law, and according to the nature of the demise the possession should be adjudged, which possession could not be said to be the possession of the copyholder, for his possession was customary, and the other was more contrary, therefore the possession of the one should not be the possession of the other, and consequently there could be no *possessio fratris*.

Anon.
4 Leon. 38.

§ 34. The right of representation takes place in the descent of copyholds, for wherever the custom gives any person the heirship, the law will give all necessary rights and incidents.

§ 35. J. S. having issue five sons, the youngest died in the lifetime of his father leaving issue a daughter.

Clements v.
Scudamore,
2 Ld. Ray.
1024.
1 P. Wms. 53.

ter. Afterwards J. S. purchased the lands in question, which were copyhold of the nature of boroug *English*: And the jury found that, by the custom, these lands were descendible to the youngest son and his heirs. The father died, and the question was, whether the lands descended to the daughter of the youngest son, or to the eldest son.

Holt, Ch. Just.—"We are all of opinion that the daughter ought to have these lands *jure representationis*. Wherever this custom hath obtained, the youngest son is thereby placed in the room of the eldest son, who inherits by the common law, and there is no other difference in the course of descent, but that the custom prefers the youngest son, and the common law the eldest son; and therefore as, at the common law, the issue of the eldest son, female as well as male, do inherit *jure representationis*, before the other brothers; so, by the same reason, where this custom has transferred the right of descent from the eldest son to the youngest, it shall also carry it to the daughter of the youngest son, by like representation; and there is no reason to make any difference between a descent by this custom, and at common law, though my Lord *Coke* is of another opinion."

§ 36. Where the customary descent is different from that prescribed by the common law, it is construed strictly; for the law does not take notice of any special customs of this kind, except gavelkind and borough *English*, unless they are expressly pleaded:
and

and then the courts will not carry them farther than the words of the custom.

§ 37. By the custom of the manor, the copyhold lands of every tenant dying seised, were descendible to the youngest son; and a surrender was made to the use of *B.* and his heirs, who died before admittance. If *B.* had been admitted, it was agreed, that after his death, the youngest son should have inherited; but dying before admittance, the question was between the eldest and the youngest son of *B.* who should have the lands: and it was adjudged that the eldest son in this case should inherit, because of the straitness of the custom, that the lands should descend, there never being any seisin in the ancestor.

Hale v. —
Cited 2 Ld.
Ray. 1025.
Paine v.
Herbert,
2 Keb. 158.

§ 38. If a custom be alledged that the eldest daughter shall solely inherit, the eldest sister shall not inherit by force of that custom. So if the custom be that the eldest daughter and the eldest sister shall inherit, the eldest aunt shall not inherit by that custom. So if the custom be that the youngest son shall inherit, the younger brother shall not inherit by that custom.

Rapley v.
Chaplain,
Godb. 166.

§ 39. *George Reve* copyholder in fee of the land in question, being parcel of the manor of *Hoo*, where the custom is, that the land is of the nature of borough *English* descendible to the youngest son, had issue three sons, *William*, *George*, and *Charles*, and surrendered his copyhold to the use of himself and *Ann* his wife and his heirs, and they were admitted accordingly. Afterwards *George* the father died seised

Reve v.
Malster,
Cro. Car. 410.

of the reversion, which descended to the said *Charles* his youngest son, who died without issue: and the question was, whether the eldest or second son should inherit from *Charles*. It was agreed that *George* the second son could not have it, as brother and heir to *Charles*, by the custom, because the custom could extend to the youngest only, and not amongst the brothers, where no such custom is found: and without a special custom found, that it shall descend to the youngest brother, the law will not admit it, because customs ought always to be taken strictly.

Denn v.
Spray,
1 Term Rep.
456.

§ 40. *Joseph Stanley* being seised of a copyhold estate, died intestate and without issue, leaving one niece *Anne Wragg*, and the representatives of two other nieces who died before him, namely *Anne Goodwin* only child of *Mary* his second niece, and *Joseph Spray* the eldest son of *Elizabeth* his eldest niece; the customary of the manor was produced, in which were the following articles respecting descents, “ Si aliquis
“ tenens hujus manerii obierit, filius suus primoge-
“ nitus et legitime procreatus habeat hereditamenta;
“ et si contingat alicui tenenti quod non habeat
“ filium, filia sua antenata habeat hæreditatem suam
“ absque partitione.”—It appeared from the court books that there were several entries where the eldest daughter, and others where the eldest sister, had been admitted as heir. But it did not appear that the eldest niece had ever been admitted as heir.

The question was, whether *Joseph Spray*, as the representative of the eldest niece, should inherit, or
whether

whether the copyhold should descend according to the rules of the common law.

The court said that as there was no proof in the court rolls, as to the course of succession in the collateral line, further than the case of a sister, it followed that this copyhold must be held to have descended to *Anne Wragg* and the descendants of the two sisters in equal shares.

In the above case a parchment writing was produced by the steward as the customary of the manor, which was admitted as evidence, it being an ancient writing (without date) found among the court rolls, and delivered down from steward to steward, and stated to be *ex assensu omnium tenentium*.

Doe v. Mafon,
3 Will. R. 63.

§ 41. In ejectment to recover certain customary lands, the lessor of the plaintiff claimed under a custom of the manor for the youngest kinsman or kinswoman to inherit, in default of brothers and sisters of the person last seised. The plaintiff offered in evidence an entry in the court rolls of the manors, stating what the custom was. But the defendant's counsel objected that such evidence of the custom ought not to be received, until instances had been proved of such a mode of descent having taken place.

Roe v. Parker,
5 Term R.
26.

The Jury found a verdict for the plaintiff; upon a motion for a new trial, on the ground that the evidence of the presentment of such a custom on the court rolls by the homage, was not of itself sufficient

Ante f. 40.

to establish the custom, in as much as no instance was produced of its being put in use, which it was contended was the true principle on which the determination of *Denn v. Spray* was founded.

Lord *Kenyon*.—"I admit that the custom of one manor cannot be extended by analogy to another : but the mode of descent, under which a party claims, must be established by proof; and the question here is, whether or not there were any evidence of the custom, upon which the plaintiff's claim was founded? The custom is clearly defined in the paper writing, produced from the court rolls; and, without referring to the strict rules of law, let us consider the authenticity of this document on principles of plain common sense. Near a century and a half ago, the homage (the tenants holding under the lord of the manor), being convened together *eo nomine* as the homage (not for the purpose of extending their claims, either against the lord or strangers, but) in order to ascertain those rights which were their own in common with the rest of the tenants, and being possessed of all that information which either tradition or their own personal observations could furnish, proceeded to describe the several customs, which regulated the descent of the different species of tenure within this manor. Now, can it be supposed that these persons, acting under the sanction of an oath, could for no purpose whatever give a false representation of these customs? or is it not more probable that their account was the true one? Common sense
" and

“ and common observation would induce us to believe
 “ the latter. The argument against the verdict seems
 “ to admit, that this document was a degree of evi-
 “ dence when it was produced to the jury ; and, if it
 “ were admissible in evidence, it not being opposed
 “ by any other species of evidence, and the jury hav-
 “ ing given credit to it, it puts an end to the question.
 “ And that this was admissible cannot be doubted ;
 “ for tradition and the received opinion are the evi-
 “ dence of the *lex loci*. A distinction indeed prevails
 “ between a prescription as applied to a particular te-
 “ nement, and a custom affecting the whole district.
 “ And the latter has gone so far, that the custom of
 “ one manor has been given in evidence to shew the
 “ custom of another, where they are both governed
 “ by the border law. Now, here was full proof of
 “ a tradition respecting the custom of descent in this
 “ manor ; it was the solemn opinion of twenty-four
 “ homagers, who are the constitutional judges of that
 “ court, delivered on an occasion when they were
 “ discussing the interests of all the tenants of the
 “ manor. I cannot distinguish this from the instance
 “ of a terrier, which is certainly evidence. The case
 “ of *Godwin v. Spray* is distinguishable from the pre- Ante f. 40.
 “ sent. Every thing, that was said by the court in
 “ giving judgment, must be understood *secundum sub-*
 “ *jectam materiem*. That case first decided, that such
 “ an instrument as the present is admissible ; and then
 “ that part of it, which said that lands were not
 “ partible either between males or females, in general
 “ terms, was to be explained by the custom as it had
 “ existed in point of fact, which did not extend to
 “ nicces.

“ nieces. And, if that decision go farther, and de-
“ termine that such a document is not admissible in
“ evidence unless instances in fact be previously proved
“ to warrant the production of it, I must beg leave
“ to dissent from it. In this case, supposing the
“ defendant had demurred to this evidence, I think
“ the court must have drawn the same conclusion
“ from it, which the jury have drawn ; and therefore
“ on the law of the case, I think that the rule for a
“ new trial should be discharged.”

TITLE XXX.

E S C H E A T.

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Section 1.

OF the two modes of acquiring a title to real property, the first, namely, *Descent*, has been treated of in the preceding title. We now, therefore, come to the second, that is, *Purchase*, which is thus defined by *Littleton*, f. 12. “Purchase is called the possession of lands or tenements, that a man hath by his deed or agreement; unto which possession he cometh not by title or descent from any of his ancestors or cousins, but by his own deed.”

Of Title by Purchase.

§ 2. Lord *Coke*, in his comment on this section, observes, that a purchase is always intended by title, and, most properly, by some kind of conveyance, either for money, or for some other consideration, or freely of gift; for that is, in law, also a purchase.

1 Inst. 18 b.

But

Plowd. 47.

But a descent, because it comes merely by act of law, is not said to be a purchase: and, accordingly, the makers of the statute 1 Hen. 5. c. 3. speak of those, who have lands or tenements by purchase, or descent of inheritance.

Grand Couft.
c. 25.
Lib. 7. c. 1.

§ 3. The feudal writers called purchase *conquestus* or *conquisitio*, both denoting any means of acquiring an estate, out of the common course of inheritance; and the Norman jurists stiled the first purchaser, or person who first acquired the estate, the *conquereur*: and Glanville uses the word *questus*, to denote the property which a person has acquired by his own act, and not by descent.

2 Com. 243.

Tit. 29. c. 3.
f. 39.

§ 4. The difference between the acquisition of an estate by descent, and by purchase, consists principally in two points: 1st, That, by purchase, the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, as a feud of indefinite antiquity. 2dly, An estate, taken by purchase, will not make the person who acquires it answerable for the acts of his ancestors, as an estate by descent will.

Of Escheat.

§ 5. The first mode of acquiring an estate by purchase is, where the lord becomes entitled to the lands of his tenant, in consequence of the death of such tenant without heirs, which is called an *Escheat*.

1 Inst. 13 a.
92 b.

§ 6. Lord Coke says, that escheat, *eschaeta*, is a word of art, and derived from the French word *escheat*, *id est, cadere, excidere, or accidere*; and signifies properly, when

when the lands fall by accident to the lord, of whom they are holden; in which case, we say the fee is escheated.

§ 7. The doctrine of escheats was originally derived from the feudal law, and was introduced into *England* by the *Normans*. It is founded on this principle, that the blood of the person last seised in fee is, by some means or other, utterly extinct and gone: and, since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence, that the inheritance itself must fail. The land must become what the feudal writers call *feodum apertum*, and must result back to the lord of the fee, from whom, or from whose ancestor, it was originally derived.

Wright's
Ten. 115.
Mag. Charta,
c. 31. 2 Infl.
64.

§ 8. An escheat was, therefore, in fact, a species of reversion, and is so called and treated by *Bracton*. And when a power of alienation was introduced, the change of the tenant changed the chance of the escheat, but did not destroy it: and, as soon as a general liberty of alienation was allowed, without the consent of the lord, this right became a sort of caducary succession, the lord taking as *ultimus hæres*.

Bract. 23 a.

§ 9. *Fitzherbert* says, a writ of escheat lies where a tenant in fee-simple of any lands or tenements, which he holds of another, dies seised, without heir general or special; the lord shall have a writ of escheat against him who is tenant of the lands after the death of his tenant, and shall recover the land; because he shall have the same in lieu of his services.

Fitz. N. B.
143.

1 Inst. 18 b.
n. 2.

§ 10. Mr. *Hargrave* has justly observed, that an escheat, in appearance, participates of the nature both of a purchase and of a descent. Of the former, because some act of the lord is requisite to perfect his title; and the actual possession of the land cannot be gained till he enters, or brings his writ of escheat. Of the latter, because it follows the nature of a feignory, and is inheritable by the same person.

Escheat for
Default of
Heirs,
1 Inst. 13 a.

§ 11. Lord *Coke* says, an escheat doth happen in two manner of ways; *aut per defectum sanguinis*, that is, for the default of heir, *aut per delictum tenentis*.

Tit. 29. c. 3.
Lit. f. 4.

Escheats arising from deficiency of blood, whereby the descent is at an end, can only be in the three following cases: 1st, Where the tenant dies without any relations on the part of any of his ancestors: 2d, Where he dies without any relations on the part of those ancestors from whom the estate descended: and, 3d, Where he dies without any relations of the whole blood. In all these cases the lands escheat, because there is no one capable of inheriting them.

Escheat from
Corruption
of Blood,
Tit. 29. c. 2.
f. 20.

§ 12. Escheats *propter delictum tenentis* arise in consequence of a person's being attainted of treason or felony, by which he becomes incapable of inheriting from any of his relations, or of transmitting any thing by heirship; so that, if any one dies seised in fee of lands, whose heir at law is attainted, the lands escheat. And, where a person attainted dies seised of lands, as he cannot have an heir, they will also escheat, unless forfeited: where that happens, they are interrupted in their

their passage by the crown ; in the case of treason, for ever ; in the case of felony, for a year and a day ; after which, they escheat to the lord of whom they were held.

§ 13. There is one instance, in which lands, held in fee-simple, are not liable to escheat : for, if lands held of *J. S.* be given to a dean and chapter, or to a mayor and commonalty, and to their successors ; if such corporation be dissolved, the land shall not escheat to the lord, but shall revert to the donor. And Lord *Coke* says, the reason of this diversity is, that, in the case of a body politic, the fee-simple is vested in them, in their political capacity : and, therefore, the law annexes a condition to every such gift, that, if such body politic be dissolved, the donor shall re-enter, for that the cause of the gift faileth. But no such condition is annexed to an estate in fee-simple, vested in any man in his natural capacity ; except in cases where the donor reserves a tenure, and then the law implies a condition by way of escheat. 1 Inst. 13 b.

§ 14. As the lord's right to an escheat arises solely from the want of a tenant to do the services, it follows that, whenever there is a tenant, the lord cannot claim the lands by escheat. No Escheat, where there is a Tenant.

Thus, *Littleton* says, if there be lord and tenant, and the tenant be disseised, and the disseisor alien to another in fee, and the alienee die without issue, and the lord enters as in his escheat, the disseisee may enter upon Sect. 390. Gilb. Ten. 25.

upon the lord, because the lord does not come to the land by descent, but by escheat.

1 Inst. 240 a.
a. 1.

Mr. *Butler* observes upon this passage, that when the lord comes to the land by escheat, the law only casts the freehold on him for want of a tenant. The disseisee,, notwithstanding the disseisin, continues the rightful tenant: and, as by his entry, he fills the possession, the lord's title, which was good only while a tenant was wanting, must necessarily be at an end.

N. B. 144.

§ 15. *Fitzherbert* says, if the tenant be disseised, and afterwards die without heir, it seemeth the lord shall have a writ of escheat, because the tenant died in the homage.

1 Inst. 268
a & b.

§ 16. Lord *Coke* says, if the disseisor dies seised, and the disseisee dies without heir, and afterwards the lord accepts rent from the heir or feoffee of the disseisor, this shall bar him of his escheat; because they are in by title. For, if the disseisor had made a feoffment in fee, or died seised, and after the disseisee died without heir, there would be no escheat; because the lord had a tenant in by title.

Fitz. N. B.
144.

§ 17. Where a man hath title to a writ of escheat, and he accepts homage of the tenant, he shall not afterwards have the writ against him; because he hath accepted him as his tenant. So, if he accepts fealty of him: but acceptance of rent will not bar the writ of escheat.

§ 18. From this principle it follows, that any alienation of the tenant will bar the lord of his escheat: and this doctrine has been carried so far, that a feoffment, made by an infant in person, will prevent an escheat.

Any Alienation prevents an Escheat.
Dyer 10 *b*.
4 Rep. 125 *a*.
Whittingham's Case,
8 Rep. 42 *b*.

§ 19. A mere contract for sale, however, does not bar the lord of his escheat, as will be shewn hereafter.

§ 20. A devise, although it only takes effect at the moment of the testator's death, will prevent an escheat: and, in a note of Lord *Nottingham's* to the first Institute, it is said that, where a woman, seised of lands in *London*, devised them to be sold by her executors, and died without an heir, the devise prevented the escheat which the king pretended to have, and the executors could enter and sell; therefore more than a bare authority passed. Yet in 1651, on evidence at the bar between *Wilkinson* and *White*, this case was stated; and Lord Ch. Just. *Roll* doubted of this opinion, because he said it was only a descent according to the words of *Littleton*; and that it appeared to him, that when lands are devised to be sold by executors, there no interest passes, as in the last clause before.

1 Roll. Rep. 214.

1 Inst. 236 *a*.
n. 1.

3 Bulst. 43.
Godb. 411.

Reeve v.
Att. Gen.
2 Atk. 233.

§ 21. A void devise will not prevent an escheat: as, where an estate in fee is devised to *T.* remainder to a stranger, this remainder will not prevent the lands from escheating, on the death of *T.* without heirs.

Idem.
Vaugh. Rep. 270.

§ 22. Whenever

To whom
Lands
escheat.

Tit. 1. f. 32.

Booth's Real
Acl. 135.

May v. Street,
Cro. Eliz. 120.

§ 22. Whenever lands escheat, they become the property of the lord of the feignory, or person of whom they were held. Now, by the statute 12 *Cha.* 2. § 24. for changing all the ancient tenures into free and common socage, the rents and services (among which fealty is accustomably due) are preserved to the lord: of him therefore the lands are still holden, and to him they may escheat. But, if all these badges of tenure have been neglected to be preserved, and it be no longer known of whom the lands are mediately holden; then the king, as the great and chief lord, shall have them by escheat: for to him fealty belongs, and of him they are certainly holden by presumption of law, and without the necessity of proof.

The Lord, by
Escheat, is
subject to In-
cumbrances.

Roll. Rep.
402.
7 Rep. 7 b.

§ 23. The lord, who acquires the land by escheat, is liable to all the incumbrances of the last tenant. Thus, if a person dies without heirs, having granted a rent, the lord by escheat will hold the lands, subject to such rent. So, if he die leaving a wife, she will be entitled to dower: and, in the case of a woman, her husband will be entitled to curtesy. For, as the tenant has a power to defeat the lord's right to escheat by any mode of alienation; he must consequently have every inferior power.

Turner v.
Hodges,
Hut. R. 102.

§ 24. Where a copyhold estate escheats to the lord of the manor, he will hold it subject to any lease, made by the copyholder, with the licence of the lord; and also to the free bench of the widow.

§ 25. The reason, that the lord by escheat is subject to the above mentioned incumbrances, is, because they are annexed to the possession of the land, without respect to any privity. But the lord, who comes in by escheat, is not subject to any incumbrances annexed to the privity of the estate; for he comes in, in the *post*: and therefore he was not bound to execute a use, for his title was paramount, namely by force of the condition in law tacitly annexed to the land, at the time of the creation of the feignory; and the tenancy comes in lieu of the feignory, which he had to his own use.

Was not bound to execute a Use.

§ 26. It appears doubtful whether, at present, a lord by escheat (being a private person) is subject to a trust.

Whether subject to a Trust, 1 Black. Rep. 178.

It is said, indeed, by the Master of the Rolls, in the case of *Eales v. England*, that if a trustee dies without heir, the lord by escheat will have the land, yet subject to the trust in Chancery.

Prec. in Cha. 200. Carter 67. Treat. of Eq. B. 2. c. 7. § 1. n. (a).

§ 27. This doctrine is contradicted in another case, where a person, seised in fee, contracted to sell his estate, and died before assurance, and without heir, so that his lands escheated to the lord; and the court refused to compel the lord to convey to the vendee: which could only be on the principle, that the lord by escheat was not compellable in equity to execute a trust.

Stephens v. Bailly, Nelf. Chan. Rep. 107.

Vide infra.

§ 28. It is laid down by Lord Chancellor *Macclesfield*, that, if a trustee of a copyhold should die with-

1 Stra. 454.

Vide *Burgess v. Wheate*,
infra l. 41.

out heir, the lord would be entitled by escheat, without being subject to the trust.

§ 29. The King is clearly not subject to a trust in a case of this kind. But, by the statute 39 & 40 *Geo.* 3. c. 88. § 12. his Majesty is enabled by warrant, under the sign manual, to direct the execution of any trusts, to which lands escheated are liable; and to make any grants of such lands to any trustee or trustees, or otherwise, for the execution of such trusts.

May distrain
for Rent.

§ 30. The Lord by escheat may distrain for rent, due to the last tenant: as, if there be lord and tenant, and the tenant makes a lease for life, rendering rent; if he afterwards dies without heir, whereby the reversion comes to the lord by way of escheat, he may distrain for the rent, because it is incident to the reversion. But he cannot take advantage of a condition of re-entry; because he is not heir to the lessor.

1 Inst. 315 b.

Entitled to a
Term to at-
tend.

§ 31. Where the inheritance escheats, and there is an outstanding term which is attendant on the inheritance, the lord by escheat will be entitled to such term.

Thurston v.
Att. Gen.
1 Vern. 340.

§ 32. A person, seised in fee, limited a term for 100 years to trustees, in trust to attend the inheritance. He afterwards died without an heir (being a bastard): and the question was, whether this term should escheat to the King, with the inheritance. It was determined, that the King was entitled to the term: for he was
not

not in barely in the *post*, but in the *per alio*; and the term for years goes with the inheritance, by the express limitation of the party.

§ 33. The lord by escheat is entitled to all the charters, concerning the lands escheated. And it is said in *Brook's Abridgement*, that, if a tenant is attainted of felony, the lord shall have his lands by escheat, and also the charters; though the charters are not forfeited.

And to all
Charters, &c.

Tit. Chart,
pl. 59.

§ 34. All lands and tenements held in socage, whether of the King, or of a subject, are liable to escheat, upon failure of heirs of the last tenant. But lands, held by the tenure of gavelkind, do not escheat for felony, but descend to the heir of the felon: from which Sir *William Blackstone* concludes, that the tenure of gavelkind is of *Saxon*, and not of *Norman*, origin.

What Things
escheat.

Rob. Gav.
226.

2 Comm. 252.

§ 35. Estates, held by copy of court roll, are also subject to escheat to the lord of the manor, of whom they are held. But, before the lord enters on the lands escheated to him, the homage ought to present the death of the tenant without heirs: and proclamation ought to be made, to give notice that, if any person comes in and justly claims as heir to the last tenant, he shall be admitted.

Co. Cop.
f. 28.
2 Vef. Jun.
170.

§ 36. No species of real property, however, is subject to escheat, but what lies in tenure: for escheat is a consequence and fruit of tenure.

§ Inf. 21.

§ 37. Thus, if a person seized in fee of a rent-charge, right of common, free warren, or any other species of inheritance, that is not holden, is attainted of felony; the King shall have the profits of them during his life; but, after his decease, as they cannot descend to his heir, on account of corruption of blood, they become extinct. For, in escheats, on account of petit treason or felony, a tenure is requisite, as well in the case of the King as of the subject.

Tit. Escheat,
pl. 6.

§ 38. It is said in *Roll's Abridgement*, that, if a man grants an advowson in gross to another in fee, and the grantee dies without heir; it seems that it shall revert to the grantor, not being held of any man: and he adds, it seems, if the grantor shall not have it, the King shall have it, as supreme ruler. But, in title Tenures B. pl. 1. it is expressly said, that an advowson in gross lies in tenure.

Tit. Ten.
pl. 15.

§ 39. In *Brook's Abridgement* a case is stated, where, in *quare impedit*, the plaintiff entitled himself, that the advowson was held of him by homage and fealty; and it was not contradicted that the advowson well lay in tenure.

A Trust does
not escheat.

§ 40. A use was not liable to escheat, because it was a species of property that did not lie in tenure. And as trusts are now, what uses were before the stat. 27 Hen. 8.; it has been determined in the following case, after great consideration, that a trust estate is not liable to escheat; but that, where *cestui que*
trust

trust dies without heirs, the trustee shall retain the lands for his own benefit.

§ 41. *Elizabeth Gunning* being seised of certain lands in fee-simple, *ex parte paterna*, married *Nicholas Harding*, but, previous thereto, (in 1695), a settlement was made of her estate, to the use of the husband for life, remainder to the wife for life, remainder to trustees to preserve contingent remainders, remainder to their first and other sons successively in tail male, remainder to the right heirs of *Elizabeth Gunning*.

Burgefs v.
Wheate,
1 Black. Rep.
123.

There being no issue male of the marriage, an indenture was made, 11th January 1718, between *Harding* and his wife of the one part, and Sir *Francis Page* and *Robert Simmons* of the other part, reciting the settlement of 1695, and covenanting to levy a fine to assure the premises to the use of the daughters of the marriage as tenants in common, and, in default of such issue, to *Page* and *Simmons* and their heirs, in trust for the said *Elizabeth Harding* her heirs and assigns, to the intent that she might, at any time during her life, without her husband's concurrence, dispose of the reversion of the moiety aforesaid, to such uses as she should by her will, or other writing, appoint. And a fine was accordingly levied.

There was no daughter of the marriage, but the wife survived the husband, and died without making any appointment, and without heirs on the part of the father, from whence the land descended. But *Burgefs*, the plaintiff, was heir on the part of the mother. After the death of *Elizabeth Harding*, Sir *Francis Page*,

the surviving trustee, got into possession; and in *July* 1739, *Burgefs* filed a bill against him, praying, that if he had any legal interest in the premises, he should be compelled to convey it to *Burgefs*.

Sir Francis Page, by his answer, insisted, that he was lawfully seised of the inheritance of the estate, and entitled to the rents and profits.

The Attorney General, on behalf of the Crown, filed an information in Chancery, insisting, that *Sir Francis Page*, by the deed of 1718, had no beneficial interest in the estate in his own right, but was a mere trustee for the benefit of *Mrs. Harding*, or her appointee, or heir, and, in default of such appointment, or heir, that he was a trustee for the benefit of his majesty, who stood in the place of such heir; that the premises were escheated, and the representatives of *Sir Francis Page* ought to convey to the use of his Majesty.

The case was argued before Lord Keeper *Henley*, assisted by Lord *Mansfield* and Sir *Thomas Clarke* Master of the Rolls.

Sir Thomas Clarke.—"The great question is, whether the Crown has a right to a conveyance of the legal estate from *Mrs. Harding's* trustee, as an equitable escheat, by the death of *Mrs. Harding*, without heirs on the part of the father. I shall consider the right of escheat in three lights: 1st, In what situation it stood in respect to a conveyance at common law before

“ fore the invention of uses. 2d, In what situation it
 “ stood with respect to a conveyance to uses before
 “ the statute of uses was made. 3d, How it stands
 “ since that statute, and now, with regard to trusts.
 “ The result and application of the whole will decide
 “ the question, how far the Crown is, or is not, en-
 “ titled, in equity, to a conveyance from the trustee.
 “ 1st, An escheat was, in its nature, feudal; a feud
 “ was the right which the tenant had to enjoy the
 “ lands, rendering to the lord the services reserved by
 “ the contract. On the other hand, an interest re-
 “ mained in the lord, after the grant made, called a
 “ *Seignory*, consisting of a right to the services of the
 “ tenant, and to the land itself, on the expiration of
 “ the grant as a reversion; a right afterwards called
 “ an escheat. And as the grant was more or less ex-
 “ tensive, the reversion was more or less remote, for
 “ feuds were sometimes temporary, sometimes heredi-
 “ tary; and a temporary one ended on the grantee’s
 “ death. Sir *H. Spelman* only takes notice of heredi-
 “ tary feuds, nor do our own laws; and though it
 “ may seem a paradox to modern ears, a feoffment to
 “ *A.* and his heirs did not pass a fee-simple originally,
 “ in the sense in which we now use it, but only an
 “ estate to be enjoyed *ut merum beneficium*, without
 “ power of alienation, in prejudice of the heir or the
 “ lord; and the heirs took it successively, as an un-
 “ fructuary interest, and, in default of heirs, the land
 “ escheated, or, strictly speaking, reverted: if there
 “ was an heir, and by legal impediment he could not
 “ take, the land escheated. When a power of aliena-
 “ tion was introduced, first with the licence of the

Bract. 23 a.
 46 Ed. 3.
 p. 4.
 Bro. Escheat,
 2.

Bract. 382.
f. 8.

Bro. Uses, 10.

Vide Tit. 11.
Uses.

“ lord, and afterwards without such licence, the right of
 “ escheat became more remote ; and when a power of
 “ charging or incumbering the feud was given to the
 “ tenant, the lord took the escheat, subject to the in-
 “ cumbrance. This power was more prejudicial to
 “ the right of escheat than the power of alienation,
 “ for that only changed the lord’s chance ; but the
 “ incumbrances defeated the right of escheat, as far
 “ as they went, 2d, Upon the introduction of uses,
 “ two distinct kinds of property might be acquired in
 “ land ; the legal estate, and the use. The *cestuique*
 “ use was no longer tenant at law, nor was the land
 “ subject to his incumbrances : but though the land
 “ was not liable at law, on account of the *cestuique*
 “ use, yet it was still liable on account of the feoffee
 “ to uses. This being found extremely inconvenient,
 “ a variety of statutes were made to restore the fruits
 “ of the tenure to the lord, against the *cestuique* use ;
 “ as wardship, relief, &c. ; but no statute was made
 “ to restore the loss of the escheat, which, as Sir
 “ Henry Spelman observes, is not only the fruit of the
 “ tenure, but the very tree itself. 3d, Thus stood
 “ the law, until the statute of uses united the use and
 “ the legal estate ; but as the courts of law determined
 “ that there were some uses to which the statute did
 “ not extend, they were called *trusts*, and succeeded
 “ to uses, *alius que et idem nascitur*. The Court of
 “ Chancery having taken cognizance of trusts, adopt-
 “ ed, in the construction of them, all those rules by
 “ which uses had been governed before the statute.
 “ The case of curtesy is the only exception, and that
 “ seems to have prevailed unaccountably, and against
 “ the

“ the opinion of the Judges themselves. Before the
 “ statute of uses, if a *cestuique* use was attained of
 “ treason or felony, the lord could not have the land,
 “ but the feoffee might retain it to his own use. And
 “ though this is introduced in *Brook*, Pl. 34., by an
 “ *ideo videtur* in a modest manner, yet many of his
 “ opinions are so introduced, and have generally been
 “ thought of great authority. From this authority,
 “ it is clear, that if Mrs. *Harding* had been *cestuique*
 “ use, and attained of treason or felony, the lord
 “ would not be entitled to escheat: and if trusts in
 “ equity are analogous to uses at law, and I think they
 “ are, neither will the Crown be entitled in the case
 “ of a trust in equity. Sir G. *Sandes’s* case is in point;
 “ and that and the case in 5 *Edw.* 4., mutually
 “ strengthen each other. *Freeman’s Report* is more
 “ accurate than that of *Hardres’*. As Lord *Hale* had
 “ an analytical head, it will give a clearer idea of the
 “ strength of his argument, to give an analysis of it.
 “ He first states several cases where trusts are forfeited,
 “ as for treason, by statute; for alienage, by prero-
 “ gative; for a debt to the Crown, partly by statute,
 “ partly by prerogative, and partly by *curfus scaccarii*,
 “ or the course of revenue. Then he distinguishes
 “ these cases from an escheat, as founded on a differ-
 “ ent ground, for want of a tenant. Then he goes to
 “ a term, and gives reasons why a trust of a term
 “ cannot be forfeited. Then comes to his conclusion,
 “ if not a chattel, then not forfeitable; if a chattel,
 “ *Freeman* never had it to forfeit. I think this good
 “ sense as well as good law. It has been said, if the legal
 “ estate had escheated to the Crown for want of an heir

Feoffm. al
Use.

“ to

“ to the trustee, it would in equity have been liable
 “ to the trust ; but this position is not proved by any
 “ authority. And, if it were true, why ought the
 “ lord to have a reciprocal equity on the death of the
 “ *cestuique* trust, without heirs ? Upon the whole,
 “ my opinion is, (to use the words of Sir *Joseph Jekyll*),
 “ that the title of the trustee should not have been
 “ set up ; but it is so ; it appears a plain and subsist-
 “ ing one ; the law is clear, and courts of equity ought
 “ to follow it in their judgment concerning titles to
 “ equitable estates, otherwise great uncertainty and
 “ confusion would ensue ; and, though proceedings in
 “ equity are said to be *secundum discretionem boni viri*,
 “ yet when it is asked, *vir bonus est quis*, the answer is,
 “ *qui consulta patrum, qui leges jura que servat.*”

Lord *Mansfield*.— “ I will follow the method used
 “ at the Bar, under the four following heads : 1st,
 “ The nature of trusts of land, and the rules that
 “ govern them. 2d, The nature of that right by which
 “ the king claims in the present case. 3d, Whether,
 “ if the trustee had died without heir, the king must
 “ not, in that case, have taken the land in a court of
 “ equity, subject to the trust. And, 4th, Apply the
 “ result of this inquiry, as between the king and the
 “ trustee, to the particular point immediately in judg-
 “ ment. 1st, As to the nature of trusts of land, and
 “ the rules by which they are governed. By an in-
 “ quiry into the nature of an use, or trust of lands,
 “ no more is or can be meant, than to find out histo-
 “ rically, on what principles courts of equity, before
 “ the statute 27 *Hen. 8.* interfered, in modifying or
 “ giving

“ giving relief, in rights or interests in lands, which
 “ could not be come at but by suing a subpœna ; and
 “ what courts of equity now do, in modifying, di-
 “ recting, and giving relief in cases of trusts where
 “ there is no other remedy but by bill. Who-
 “ ever shews that the relief now given is more exten-
 “ sive, that it is considered by different or opposite
 “ rules, that the right is considered in different or
 “ opposite lights, will shew the difference and contrast
 “ between uses and trusts. The opposition is not
 “ from any metaphysical difference in the essence of
 “ the things themselves. An use and a trust may
 “ essentially be looked upon as two names for the
 “ same thing ; but the opposition consists in the dif-
 “ ference of the practice of the Court of Chancery.
 “ If uses before the stat. *Hen.* 8. were considered as a
 “ perpanancy of the profits, as a personal confidence,
 “ as a chose in action; and now trusts are considered
 “ as real estates, as the real ownership of the land ;
 “ so far they may be said to differ from the old uses,
 “ though the change may not be so much in the na-
 “ ture of the thing, as in the system of law by which
 “ it is regulated. The old law of uses does not con-
 “ clude trusts now ; where the practice is founded on
 “ the same reason and grounds, it is still followed.
 “ But its positive authority does not bind where the
 “ reason is defective : more especially that part of the
 “ old law of uses, which did not allow any relief to
 “ be given for or against estates in the post, does not
 “ now bind by its authority in the case of trusts.
 “ Trusts, from the nature of the thing, may be left
 “ to the honour and faith of the trustee : in that case,
 “ they

“ they are not the objects of law, otherwise than as
 “ they may be fraudulent, and void in respect to third
 “ persons ; or a court of justice may take cognizance
 “ and compel the execution of them : in that case,
 “ trusts only retain the name ; in substantial owner-
 “ ship, the disposition in trust becomes the mere form
 “ of a legal conveyance. Trusts, in *England*, under
 “ the name of uses, began, as they did in *Rome*, under
 “ no other security than the trustee’s faith ; they were
 “ founded in fraud to avoid the statute of mortmain.
 “ Trusts were not on a true foundation till Lord *Not-*
 “ *tingham* held the Great Seal : by steadily pursuing
 “ trusts from plain principles, and by some assistance
 “ from the Legislature, a noble, rational, and uniform
 “ system of law has been raised ; trusts are made to
 “ answer the exigencies of families, and all other
 “ purposes, without producing one inconvenience,
 “ fraud, or private mischief, which the statute of *Hen. 8.*
 “ meant to avoid. The forum where they are ad-
 “ judged, is the only difference between trusts and
 “ legal estates. Trusts, here, are considered as be-
 “ tween the *cestuique* trust and trustee, as the owner-
 “ ship, and as legal estates ; whatever would be the
 “ rule of law, if it was a legal estate, is applied in
 “ equity to a trust estate. Trust estates are liable to
 “ curtesy ; the case of dower is the only exception,
 “ and not on law or reason, but because a wrong de-
 “ termination had mislaid in too many instances, to be
 “ now altered and set right ; and if an alteration was
 “ to be introduced, the best way to set it right would
 “ be, to allow the wife dower of a trust estate. In
 “ the eye of this court, Lord *Hardwicke* thought the
 “ equity

“ equity of redemption was the fee-simple of the land ;
 “ that it would descend, might be granted, entailed,
 “ devised ; and that an equitable entail might be barred
 “ by a common recovery. This proves it is confi-
 “ dered in this court as an estate, whereof there may
 “ be a seisin ; for, without such a seisin, a devise of
 “ a trust could not be good. The allowing curtesy
 “ of a trust, is founded on the maxim, that equity
 “ follows the law, which is a safe as well as fixed
 “ principle ; for it makes the substantial rules of pro-
 “ perty certain and uniform, be the mode of follow-
 “ ing it what it will. It follows from the great au-
 “ thority of this determination, on clear law and rea-
 “ son, that the *cestuique* trust is, in the consideration
 “ of this court, actually and absolutely seised of the
 “ freehold. To conclude this head, an use was ori-
 “ ginally understood to be merely as an agreement, by
 “ which the trustee, and all claiming in privity under
 “ him, were personally liable to the *cestuique* trust, and
 “ all claiming under him, in like privity. Nobody in
 “ the *post* was entitled under, or bound by the agree-
 “ ment. But now the trust, in this court, is the same
 “ as the land, and the trustee is considered therefore
 “ merely as an instrument of conveyance ; he is in no
 “ event to take a benefit. The trust must be co-ex-
 “ tensive with the legal estate, and where it is not de-
 “ clared, it results by necessary implication ; because
 “ the trustee is excluded ; except where the trust is
 “ destroyed, by a conveyance to a purchaser without
 “ notice for a valuable consideration.

“ The

“ The trustee can transmit no benefit ; his duty is
 “ to hold for all those who would have been entitled,
 “ if the limitation had not been by way of trust.
 “ There is no distinction now between those in the
 “ *per* and the *post*, except in the case of dower, which
 “ is not founded on reason, but on practice.

“ As the trust is the land in this court, so the de-
 “ claration of trust is the disposition of the land ;
 “ therefore an essential omission in the legal disposition
 “ shall not destroy the trust. The grounds why the
 “ lord by escheat neither took, nor was subject to an
 “ use, do not now subsist. The principles upon which
 “ the question must now be argued, have no relation
 “ to it, which ever way it ought to be determined ;
 “ or rather, none of those principles were made, or
 “ could ever be considered in the law of uses, for this
 “ court never interposed in cases where the claim was
 “ in the *post* ; and, for that reason, it is taken for
 “ granted in *Edward* the Fourth’s time, that the lord
 “ shall not have it.

“ 2d, This brings me to consider the nature of this
 “ right by escheat.

“ It has been truly said, that on the first introduc-
 “ tion of the feudal law, this right was a strict rever-
 “ sion. When the grant determined by failure of
 “ heirs, the land returned as it did upon the expira-
 “ tion of any smaller interest. It was not a trust, but
 “ the extinction of the tenure ; (as Mr. Justice *Wright*
 “ says), it was the fee returned.

“ This

“ This distinction holds equally, whether the investiture was to special or general heirs ; for, originally, the tenant could not alien in any case, without the lord’s concurrence. The reversion took effect in possession, for want of an heir, unless the lord had done, or permitted, what, in point of law, amounted to a consent to a new investiture or change of his vassal ; this is the meaning of what is said in the books, that nothing escheats where the tenant is in by title. As soon as a liberty of alienation was allowed, without the lord’s consent, this right became a caducary succession, and the lord took as *ultimus hæres* ; but the resemblance of the lord’s right by escheat to that of the heir by descent, does not hold throughout, and, therefore, Sir *Edward Coke*, with 1 Inst. 215. great accuracy, considers the lord by escheat as assignee in law. He took no possibility or condition, or right of action, which could not be granted ; he could not elect to avoid voidable acts, as a feoffment of an infant with livery : but every right preserved to the heirs, which could be granted, goes to the lord by escheat, as a rent reserved to the tenant and his heirs.

“ In the case of *Thrunston* and the Attorney General, Ante f. 32. the benefit of a trust term was decreed to the king by escheat ; because it was to go with the inheritance by the express limitation of the parties.

“ 3d, Whether, failing heirs of the trustee, the king must not, in this case, have taken the estate in a court of equity, subject to the trust ?

“ This

“ This seems, in the present case, to be a very ma-
 “ terial consideration ; for, if the king is not to be
 “ subject to the trust, there is no colour that he should
 “ claim the trust by escheat. That land escheated
 “ should be subject to the trust, appears to me to be
 “ most consistent with the king’s right, whether the
 “ escheat be considered as a reversion, as it once was,
 “ as a caducary possession *ab intestato*, as it now sub-
 “ stantially is. The king cannot claim by escheat
 “ contrary to the terms or conditions which the tenant
 “ held under. From which, two things follow: 1st,
 “ That there is equity against the king ; and, 2d, That
 “ the lord is bound, as much in a court of equity, by
 “ the equitable terms of his investiture, as he is in
 “ a court of law by the legal terms. Taking the estate
 “ as a caducary possession, the lord can only take *ab*
 “ *intestato* absolutely : so far as the tenant has not
 “ disposed of the estate he can take, and no farther.
 “ The tenant’s power of disposing is absolute, without
 “ the lord’s privity ; without any determined form of
 “ conveyance. The trustee has, by his declaration
 “ of trust in 1718, made a valid conveyance of his
 “ trust in equity, and therefore a court of equity can-
 “ not, I apprehend, suffer the land to go as undisposed
 “ of by the tenant ; because, in the consideration of
 “ this court, there is a valid disposition made by him.
 “ But even at law the escheat would not be free from
 “ the trust. The statute of frauds makes a trust assets
 “ in the hands of the heir of *cestuique* trust ; con-
 “ sequently, for that purpose, the estate descends to
 “ the heir.

“ In 18 *Car.* 2., before trusts were put on the ra-
 “ tional footing they are now, the apprehension of the
 “ judges was, that the lord by *escheat*, ought to be
 “ subject to the trust. Lord *Bridgman* thought so.
 “ In 1702, Sir *John Trevor* certainly knew there could
 “ be no *escheat* of an use. If it was not to be subject
 “ to the trust, I think the inconvenience would be
 “ very great; and where we are not tied down by any
 “ erroneous opinions, which have prevailed so far in
 “ practice, that property would be shook by an alte-
 “ ration of them, arguments of convenience and in-
 “ convenience are always to be taken into considera-
 “ tion. Almost all the great estates in *England* are
 “ now limited in trust; the trustees are men of busi-
 “ nefs probably concerned for the family, and at a
 “ little distance of time their pedigrees are not to be
 “ traced; and if the surviving trustee was to die with-
 “ out heir, it would be thought hard if the estate
 “ should be lost. But I rest upon this; it seems to
 “ be a contradiction in terms, that he who has no claim
 “ but *ab intestato*, where the owner has not disposed
 “ of his property, should take contrary to and in pre-
 “ judice of his disposition. The heir of blood might
 “ as well claim the estate in contradiction to the equi-
 “ table charge. An *escheat* is now as much a title
 “ under the former owner, in consequence of his
 “ former seisin, as that of the heir: Why else shall
 “ the lord be deemed the assignee or heir of the te-
 “ nant? I think the lord may be considered as much
 “ his heir as the heir by blood, and is as much liable
 “ to all his dispositions.

Prec. in Ch.
 200.

“ 4th, If what I have said be right, little is left for
 “ me to say on this head. If the lord takes an escheat
 “ as heir or assignee in law, then the king is within
 “ the exprefs declaration of trust, which is to *Eliza-*
 “ *beth Harding*, her heirs and assigns.

“ Upon the whole, I think the king is entitled to
 “ a decree.”

Lord Keeper.—“ 1st, I shall take notice of the
 “ claim of the crown, because several of the argu-
 “ ments I shall make use of will tend to support the
 “ opinion I shall give on the other claims.

“ The question on the information is, whether *confui-*
 “ *que* trust dying without heirs, the trust is escheated
 “ to the crown, so that the lands may be recovered in
 “ a court of equity by the crown, or whether the
 “ trustee shall hold them for his benefit. The que-
 “ stion is entirely a question of tenure, and not of
 “ forfeiture.

“ I shall consider, 1st, The right of lords to escheat
 “ at law. 2d, Whether they have received a different
 “ modification in a court of equity. 3d, The argu-
 “ ments used in support of the information; and,
 “ from the whole, draw this conclusion, that the
 “ crown has, in this case, no equity.

“ The legal right of escheat with us, arises from the
 “ law of enfeoffment to the tenant and his heirs, and
 “ then it returned to the lord, if the tenant died with-
 “ out heirs.

“ The

“ The extension of the feoffment from the person
 “ of the tenant, to the heirs special of his body, and
 “ then to his heirs and assigns, is accurately traced in
 “ a treatise of tenures by a learned hand. This re- Sir M.
 “ duces the condition of the reversion to this single Wright.
 “ event, *ob defectum tenentis de jure*.

“ The lord became entitled to the land by escheat
 “ in lieu of his services. The books are uniform,
 “ that, in the case only of the tenant’s dying without
 “ heir, the escheat took place. As long as the te-
 “ nant, or his heir, or any other person by his implied
 “ assent, continued in possession by title, that prevented
 “ the escheat. This shews, that where there was a
 “ tenant actually seized, though he had no right to the
 “ tenements, and though the person who had right
 “ died without heirs, yet the escheat was prevented ;
 “ for, if the lord has a tenant to perform the services, Roll Ab. 816.
 “ the land cannot revert in demesne. 1 Inst. 268 b.

“ Upon these cases I would observe, that the lord’s
 “ consent had nothing to do with establishing the right
 “ of the tenant’s being duly seized ; because, in every
 “ one of these cases, they all come in without the
 “ lord’s consent, unless it can be said, that the lord is
 “ a virtual assenter as well to the disseins as to the
 “ legal conveyances : and if that be so, it would ope-
 “ rate to the establishing the right of the trustee here,
 “ who would say he is entitled under a conveyance in
 “ law, by the very consent of the lord ; which is a
 “ stronger case than a disseisin. From these cases and
 “ authorities it must be allowed to be settled, that the
 “ law did not regard the tenant’s want of title, as
 “ giving the lord a right to the escheat.

“ 2d, The next consideration is, whether a court
 “ of equity can consider it in a different light : now,
 “ when the tenant did not die seised, and a proper
 “ legal tenant by title continued, and, consequently,
 “ the lord’s feignory and services continued, can this
 “ court say to the lord, your feignory is extinguished,
 “ and to the tenant, your tenancy is so too, though
 “ both are legal rights now subsisting in law? In con-
 “ sideration of uses with regard to escheats, equity has
 “ proceeded on the same principle as the law, where
 “ there was a tenant of the land that performed the
 “ services : and I do not find this court had any regard
 “ to the *merum jus* of the tenant. Now, the reason
 “ why there was no escheat on the death of *cestuique*
 “ use, in equity, seems to be this, (and it is a reason
 “ equally applicable to uses and trusts), that the court
 “ had nothing to issue a subpœna upon ; no equity ;
 “ nothing to decree upon ; and every person must
 “ bring an equity with him, for the court to found its
 “ jurisdiction upon. It seems to me, he could have
 “ no equity in the case of an use, or as owner of the
 “ trust, for this plain reason : an use before the sta-
 “ tute could not be extended farther than the interest
 “ in the estate, which the creator of the use could
 “ have enjoyed. As, if the creator of the use had
 “ a fee-simple in the land, he could take back no more
 “ interest in the use, either declared, or resulting,
 “ than he had in the land. If he makes a feoffment,
 “ and declares no uses, it results to him in fee, which
 “ is to him, his heirs and assigns. The consequence
 “ is, that the moment he dies without heirs or assigns,
 “ there was no use remaining. How, then, can you
 “ come here for a subpœna, (whether he took back
 “ the

“ the same or a different use), to execute an use or
 “ trust which was absolutely extinct ?

“ That seems to me the plain and substantial reason
 “ why, in this case, (whether you call it an use or a
 “ trust), there was no basis on which to found a sub-
 “ pœna. Lord Chief Justice’s system is very great and
 “ noble, and very equitably intentioned. Such a
 “ system as I should readily lay hold of upon every
 “ occasion, if I thought I could do it consistently with
 “ the rules of law. Where you have passed the estate
 “ without consideration, there, in modern language,
 “ an use results ; because it is unequitable that a man
 “ should have an interest in the estate, when he has
 “ paid no consideration for it. But where a person
 “ is not party to the deed, nor privy to the estate, I
 “ do not see how any thing can result for his benefit.
 “ That this was the notion in respect to an use, ap-
 “ pears from authorities. The law was, that the
 “ lord could not have the escheat of an use. So is
 “ 5 *Edw. 4.*, for I take that to be the report of a
 “ case ; then it has all the authority the year-books
 “ carry with them. And this has been adopted by all
 “ the writers since. *Bacon*, 79. does not question the
 “ authority of this case. He gives a reason of his
 “ own, which he substitutes as a better than that in
 “ the books, that there is a tenant in by title, which
 “ is a strong reason in law ; but it does not mention
 “ that as a reason with regard to the subpœna. It is
 “ not a conclusive reason, that the lord shall not have
 “ subpœna, because there is a person in possession.
 “ He should have it for that reason, if that person is
 “ liable to him in equity. Therefore he gives a better
 “ reason,

“ reason, because, says he, it never was his intent to
 “ advance the lord, but his own blood. Therefore
 “ that is the reason; it would not be within the in-
 “ tention of that trust, that any besides the blood of
 “ the covenantor should take. Nobody can imagine
 “ the tenant intended to provide a trust to answer the
 “ lord’s escheat. Mrs. *Harding* never thought of
 “ escheat I suppose; but, had it been suggested to her,
 “ if you die without heirs that can possibly take your
 “ estate, would you rather have your friend you have
 “ chosen to make your trustee have it, or that it should
 “ go to the king? She must have been a subject of
 “ more zeal than I can suggest, if she had said, she
 “ would give it to the king.

“ As I am now stating the law of escheats with regard
 “ to uses and trusts, I will here take notice of an ob-
 “ jection, that seems equally to affect the opinions of
 “ lawyers, with regard to the doctrine of uses and
 “ trusts; and that is the dilemma which was urged at
 “ the bar, as the basis of the equity in the present
 “ case, though I do not think it a necessary dilemma,
 “ viz. that the lord must have the estate by escheat,
 “ either on the death of *cestuique* trust without heirs,
 “ or of the trustee without heirs, discharged of the
 “ trust; but if he cannot have it while the trustee
 “ lives, while there is a tenant, it would be monstrous,
 “ that the *cestuique* trust should be prejudiced by put-
 “ ting the estate in the trustee’s hands for the benefit
 “ of the family. One part of this is a dangerous
 “ conclusion; the other is not. My answer is, that
 “ if the law be so, that the lord shall in that case take
 “ it discharged of the trust, I must suppose it no injury
 “ or

“ or absurdity at all, *volenti non fit injuria*. The
 “ creator of the trust determines to take the conveni-
 “ ence of the trust, with its inconvenience. It is
 “ most certain, every man who creates a trust, puts
 “ his estate in the power of his trustee. If the trustee
 “ sells it for a valuable consideration without notice,
 “ no court can relieve the owner from this misfortune ;
 “ it is the result of his own act ; and yet that is as
 “ shocking a perfidy in the trustee, as can be ; but
 “ the court cannot interpose, as it would affect the
 “ rights of others, of third persons.

“ But I do not think this at all a necessary dilemma :
 “ the lord may not be entitled on the death of *cestuique*
 “ trust without heir ; because there is no equity ; for
 “ he has a tenant as he had before. But, possibly,
 “ there may be an equity the other way against the
 “ lord : for if the trustee died without heir, and the
 “ lord had the estate, this court might say, you shall
 “ hold to compensate yourself for your rent and ser-
 “ vices, but we will embrace the rest for the *cestuique*
 “ trust.

“ A difference was attempted to be made between
 “ uses and trusts ; but, by comparing the definitions
 “ of the two, it will appear they are precisely the
 “ same. It was said the difference consists in this,
 “ that equity has shaped them much more into real
 “ estates, than before, when they were uses. As
 “ now there is tenancy by the curtesy of a trust, it may
 “ be intailed, and the intail may be barred by a com-
 “ mon recovery. But why ? Not from any new
 “ essence they have obtained, but from carrying the

“ principle farther, *quia equitas sequitur legem*; for
 “ as between the trustee and *cestuique* trust, this court
 “ had jurisdiction; and I think they should have
 “ equally extended in this court the rules and principles of uses, as well as those of trusts.

“ Would it not be a bold stroke to say, this court
 “ has considered trusts as a mere nullity, and that they
 “ are to be treated in the same manner as if they continued in the seisin of the creator of them, or of the person for whom they were made. Rules of property are not to be questioned, even by the judges: while the people continue satisfied, and acquiesce in them, none but the Legislature can alter them. My objection to the claim in the information is, not that it is to have a trust executed as if it were land, but it is to claim the execution of a trust that does not exist: if there was a trust, I should consider it merely as an estate, and determine accordingly. But the creation of a trust never can affect the right of a third person.

“ I can assign but one reason why that distinction
 “ between tenancy by curtesy and in dower has prevailed; and it is applicable to the reason of this case. I have heard the House of Lords were startled at the distinction; and they were told the opinion of conveyancers was so, and that, if it was altered, it might load purchasers with dower, who thought they had purchased free from it. And the lords would not reverse the judgment, because they would not let it affect the right of a third person. Now, it appears to me, that, at law, there can be no
 “ escheat,

“ escheat, while there is a tenant *de jure*. In equity
 “ there could be none, while trusts were called uses;
 “ and a trust and an use are exactly the same. How,
 “ then, can I say, the lord shall lose his escheat, when any
 “ man for his own convenience puts his estate in trust.
 “ It seems, if I were to do so, that I should *give* law
 “ and equity, and not *pronounce upon* law and
 “ equity.”

Two centuries have passed since uses and trusts have
 been admitted, and I cannot find a *dictum*, that the
 crown shall have an escheat of a trust: but I find in
 other books the contrary, and, by one of the most
 learned judges that ever adorned the profession.

Stamford,
 P. C. 186.
 Pine's Case,
 496.
 Palmer, 176.
 1 Hale, P. C.
 247.

Every writer of learning has transcribed and adopted
 this position, so that it is confirmed by them, *viz.*: by
 attainder of felony of the feoffee, the lord shall have
 the land by escheat.

The information, on the part of the crown, was
 dismissed.

§ 42. In the above case, the Lord Keeper is re-
 ported to have laid it down, that an equity of redemp-
 tion was not liable to escheat. His words are: “ It
 “ was said, if a mortgagor die without heir, shall the
 “ mortgagee hold the land free? I answer, shall it
 “ escheat to the crown? No: because, in that case,
 “ the lord has a tenant to do his services; and that is
 “ the whole he is entitled to, in law and equity.
 “ What the justice might be between the mortgagee
 “ and executor, I shall not trouble myself about.

Nor an
 Equity of
 Redemption.

“ I think the crown has not an equity, on which to
 “ sue a *subpoena*.”

This point has never (I believe) been determined.

Money to be
 laid out in
 land.

§ 43. Where money is directed to be laid out in land, but the quality of real estate is not imperatively and definitively fixed upon it by the instrument, and it remains *ad arbitrium*, whether it is to be considered as land or money, the crown, on failure of heirs, has no equity against the next of kin to have it laid out in real estate, in order to claim the escheat.

Office of
 Escheator,
 1 Inst. 13 b.
 4 Inst. c. 43.

§ 44. There were formerly officers called escheators, whose duty it was to look into escheats, wardships, and other casualties, belonging to the crown. Originally, there were but two escheators, one on the north, and the other on the south of the *Trent*; but, in the time of *Edward 3.* there was an escheator in every county, who was named by the lord treasurer.

7 Vef. Jun.
 71.

§ 45. In a modern case, Lord *Eldon* said, it is perfectly familiar, that, where there is an escheat for want of heirs, and the fact is not communicated, it is usual to petition the king; stating that there is such an interest, and praying some reward upon the ground of the discovery, if it can be made out: and the ordinary rule upon an escheat is, for the crown to give a lease, as good a lease as it can give, to the person making the discovery.

TITLE XXXI.

PRESCRIPTION.

CHAP. I.

Prescription by immemorial Usage.

CHAP. II.

Of the Statutes of Limitation.

CHAP. I.

Prescription by immemorial Usage.§ 1. *Origin of Prescription.*6. *Prescription by immemorial Usage.*8. *Prescription in the Person and in the Estate.*10. *What may be claimed by Prescription.*24. *Prescription must be Time out of Mind.*§ 28. *And have a continued Usage.*31. *Must be certain and reasonable.*34. *Of void Prescriptions.*41. *How a Prescription may be lost.*46. *Descent of Estates acquired by Prescription.*

Section 1.

BY the law of nature, occupancy not only gave a right to the temporary use of the soil, but also a permanent property in the substance of the earth itself; and to every thing annexed to, or, issuing out of it. Hence, possession was the first act, from which the right of property was derived; and therefore it has been established as a rule of law, in every civilized country, that a long and continued possession should give a title to the property thus possessed.

Origin of
Prescription.

§ 2. This

Vin. Lib. 2.
Tit. 6.

§ 2. This mode of acquiring property was well known in the *Roman* law, by the name of *usucupio*; because a person, who acquired a title in this manner, might be said *usu rem capere*: it is thus defined by *Modestinus*—*Adjectio dominii per continuationem possessionis, temporis lege definiti*.

1 Inst. 113 b.

In the *English* law it is called prescription, and is thus defined by Lord Coke—*Prescriptio est titulus, ex usu et tempore substantiam capiens, ab auctoritate legis*.

Domat. vol. 1.
461.

§ 3. Every species of prescription, by which property is acquired or lost, is founded on this presumption; that he, who has a quiet and uninterrupted possession for a certain number of years, is supposed to have a just right, without which he could not have been suffered to continue in the enjoyment of it; for a long possession may be considered as a better title than can commonly be produced; it supposes an acquiescence in all other claimants; and that acquiescence also supposes some reason, though perhaps unknown, for which the claim was forborn.

Braet. Lib. 2.
c. 22.

§ 4. The doctrine of prescription appears to have been very soon established in *England*; and, from what is said of it by *Bracton*, seems to have been derived from the *Roman* law: for he lays it down, that a title may be gained both to corporeal and incorporeal hereditaments, by a long and uninterrupted possession — *Dicitum est in præcedentibus, qualiter rerum corporalium dominia ex titulo, et justa causa acquirendi, transferuntur per traditionem. Nunc autem dicendum, qualiter transferuntur*

feruntur sine titulo, per usucaptionem; scil. per longam, continuam, et pacificam possessionem ex diuturno tempore, et sine traditione.

§ 5. Our modern writers, however, have only allowed a positive prescription to operate in the case of incorporeal hereditaments; such as rights of common, rents, &c. where the person, who claims, can shew no other title, than that he and those, under whom he claims, have immemorially used to enjoy them. But there is another kind of prescription adopted by the *English* law, extending to lands; by which an uninterrupted possession, for a certain number of years, will give the possessor a good title, by taking away from all other persons the right of entering on the lands, or of bringing any species of action for them.

§ 6. There are, therefore, two kinds of prescription known to the *English* law. First, a prescription to incorporeal hereditaments by immemorial usage; as, when a person shews no other title to what he claims, than that he and those, under whom he claims, have immemorially used to enjoy it.

Prescription
by immemo-
rial Usage.

Bract. Lib. 2.
c. 22. f. 2.

§ 7. Prescription by immemorial usage differs from custom in this respect; that custom is properly a local usage, and not annexed to the person; such as the custom, that all the copyholders within a manor have common of pasture within a particular waste; whereas prescription is always annexed to a particular person.

1 Inst. 113 b.
4 Rep. 31 b.
32 a.

in the Person
and, in the
Estate.

1 Inst. 113 b.

§ 8. This kind of prescription is of two sorts: either it is a personal right, which has been exercised by a man and his ancestors, or by a body politic and their predecessors: or else it is a right, attached to the ownership of a particular estate, and only exercisable by those who are seised of that estate. In the first case, it is termed a prescription in the person; and, in the second case it is called a prescription in a *que estate*.

6 Rep. 60 a.

§ 9. A prescription in a *que estate* must always be laid in the person, who is seised of the fee simple. A tenant for life, for years, or at will, or a copyholder, cannot prescribe in this manner, by reason of the imbecility of their estates: for, as prescription is always beyond time of memory, it would be absurd that those, whose estates commenced within the memory of man, should pretend to prescribe for any thing; and, therefore, a tenant for life must prescribe under cover of the tenant in fee simple; and a copyholder, under cover of his lord.

What may be
claimed by
Prescription.

§ 10. Prescription by immemorial usage only extends to incorporeal hereditaments; such as commons, ways, waifs, estrays, wreck, court leet, park, warren, fishery, &c.: but it cannot give a direct title to lands, or other corporeal inheritances; of which more certain evidence may be had.

f. 310.

§ 11. It is, however, said by *Littleton*, that tenants in common may be by title of prescription; as if the one and his ancestors, or they whose estate he hath in

one

one moiety have holden in common the same moiety with the other tenant, who hath the other moiety, and with his ancestors; or with those, whose estate he hath, undivided, time out of mind of man. Lord Coke observes upon this passage, that it is founded on good authority; but that joint tenants cannot be by prescription, because there is a survivorship between them, but not between tenants in common.

§ 12. A person may have frank foldage by prescription, but it must be appendant to land: and a man may prescribe, that he and his ancestors, time out of mind, have had frank foldage of the beasts of his tenants in a particular place. 1 Inst. 114 b.

§ 13. In trespass, the defendant justified under a prescription, that the lords of the manor of *H.* had and always used to have free foldage throughout the vill of *H.*, and to have the penning of the sheep; so that the vill of *H.* ought not to have free foldage, without the consent of the lord: and that, if any levied a fold without such consent, the lord had used to abate it. It was urged that this prescription was void, being against common right; which gave every one foldage in his own land. *Sed non allocatur*, for every prescription is against common right; and it did not extend to deprive the owner of the whole interest and profit of his land, which would not have been good, but only precluded him from setting up hurdles, which was a reasonable prescription, and restrained a particular profit only. Jeffry at Hay's Case, 8 Rep. 125 a.

Punfany v. Leader.
1 Leon. 11.

§ 14. A prescription

1 Vent. 387.

§ 14. A prescription by immemorial usage can, in general, only be for things, which may be created by grant: for the law allows prescriptions, only in supply of the loss of a grant. Ancient grants must often be lost; and it would be hard, that no title could be made to things lying in grant, but by shewing the grant. Upon immemorial usage, therefore, the law will presume a grant, and a lawful beginning; and allows such usage for a good title, but still it is only to supply the loss of a grant. And therefore for such things, as can have no lawful beginning, nor be created at this day, by any manner of grant or reservation; or deed, that can be supposed, a prescription is not good.

Tit. 27. f. 72.

1 Inst. 114 a.
5 Rep. 109 b.

§ 15. It has been stated in a former title, that as to such franchises, as cannot be seized as forfeited, before the cause of forfeiture appears upon record, no title can be made by prescription: because, prescription being but an usage *in pais*, it cannot extend to those things, which can only be seized or had by matter of record; such as the goods and chattels of traitors, felons, fugitives, deodands, &c. But to treasure-trove, waifs, estrays, wreck, court-leet, park, warren, &c. a person may make a title by usage and prescription.

Goodson v.
Duffield,
Cro. Jac. 313.

§ 16. It was resolved in 9 Jac., that a court of piepowder may be pleaded to be held by prescription, and by charters of the king and his progenitors, *concessa et confirmata*. For a court of this kind, being by prescription, is not taken away by the grants and confirmations

confirmations of kings. But they may use their charters as confirmations, or as grants, or may claim those liberties by prescription, notwithstanding such charters: and, if the charter be not contrary to the prescription, it will be good by way of confirmation. 3 Bulst. R. 21.

§ 17. It was held in a modern case, that an ancient grant without date does not necessarily destroy a prescriptive right: for such grant may either be prior to the time of memory, or in confirmation of such prescriptive right.

§ 18. In trespass, the defendants plead that *Clode* was seised of a messuage, &c. and that "he and all those, whose estate he hath, &c. for the time being had and used, and had been accustomed to have and use, and so still of right ought to have and use," common of pasture in the place, where, for all commonable cattle levant and couchant, and thereupon justifies, &c. Addington v. Clode,
2 Black. Rep.
989.

The plaintiff traversed the right of common, and produced two ancient charters without date, containing a grant of common. The Judge being of opinion, that those grants were inconsistent with the plea of prescription, a verdict was given for the plaintiff.

Upon a motion for a new trial, it was urged for the defendant, that those grants might only be in confirmation of an antecedent prescriptive right, and then were not inconsistent with it.

The court was of opinion that those grants might either be before time of memory; or else they might have been only in confirmation of a prior right, in neither of which cases would they have been inconsistent with a plea of prescription. It ought to have been left to the jury to decide, whether either of these was the case.—A new trial was granted.

1 Inst. 114
a. & b.
5 Rep. 109 b.

§ 19. Nothing can be claimed by prescription, which owes its origin to matter of record: for prescription, being only an usage *in pais*, does not extend to those things, which can only be seised or had by matter of record; as the goods and chattels of traitors and felons, felons of themselves; fugitives, persons put in exigent, deodands, &c. And Lord Coke says, that things of this kind cannot be seised or forfeited; unless the cause of forfeiture appear upon record.

Tit. 27.

Pill v.
Towers,
Cro. Eliz. 791.

§ 20. There can be no prescription for what the law gives of common right: and therefore a lord of a manor cannot prescribe to have a court baron within his manor, because it is of common right, and incident to a manor; but a lord of a manor may prescribe to enlarge the jurisdiction of his court.

Kitch. Courts
105 b.

§ 21. An easement, which is a service or convenience, that one neighbour hath of another, without profit, as a way through his land, a sink, or such like, may be claimed by prescription; but a multitude of persons cannot prescribe for an easement, though they may plead a custom.

§ 22. Where a person prescribes in a *que estate* he can claim nothing under such prescription, but what is appendant and appurtenant to land : for it would be absurd to claim any thing as the consequence of an estate, with which the thing claimed has no connexion.

Lit. f. 183.

§ 23. A man cannot prescribe in any thing by a *que estate*, that lieth in grant, and cannot pass without a deed or fine ; but in him and his ancestors he may, because he comes in by descent, without any conveyance.

1 Inst. 121 a.

§ 24. There are two circumstances, necessary to form a prescription ; first, time whereof the memory of man runneth not to the contrary.

Prescription
must be Time
out of Mind,
Lit. f. 170.
1 Inst. 115 a.

Time of memory has been long since ascertained by the law, to comence from the beginning of the reign of *Richard 1.* : and it seems somewhat extraordinary, that the date of legal prescription should continue to be reckoned from so distant a period.

§ 25. This time is understood, not only of the memory of any man living, but also of proof by any record or writing to the contrary : for, if there be any sufficient proof by record or writing, although it exceed the memory or proper knowledge of any man living, yet it is within the memory of man. For memory or knowledge is twofold : first, knowledge by proof, as by record or sufficient matter of writing ; secondly by a man's own proper knowledge.

Idem.

§ 26. It follows, that, where there is any proof of the commencement or origin of a right, since the time of *Richard 1.*, it cannot be claimed by prescription.

Pringle v.
Child,
2 Roll. Ab.
269. pl. 17.

§ 27. A vicar, endowed *de minutis decimis*, in the year 1310 sued the parson appropriate for them. And it was held, that the parson could not prescribe against this endowment, though it was 300 years past; for the prescription ought to commence since the endowment, which was subsequent to the time of limitation.

And have a
continued
Usage,
1 Inst. 113 b.
Id. 114 b.

§ 28. Lord *Coke* says, that every prescription must have a continual and peaceable usage, and enjoyment: for, if repeated usage cannot be proved, the prescription fails. But, where a title has once been gained by prescription, it will not be lost by any interruption of the enjoyment of it for ten or twenty years.

Mem.

§ 29. Thus, if a man hath a right of common by prescription, and he takes a lease of the land for twenty years, whereby the common is suspended; he may, after the determination of the lease, claim the common again by prescription: for the suspension was only of the enjoyment, and not of the right.

§ 30. Formerly, a person might have prescribed for a right, though the enjoyment of it was suspended for an indefinite time; but this is now altered, as will be shewn in the next chapter.

§ 31. A prescription must be certain: and, therefore, a prescription to pay for tithes a penny, *or thereabouts*, for every acre of arable land, is bad. It must also be reasonable: thus, a prescription for setting out tithes, without the view of the parson, is void, as being unreasonable.

Must be certain and reasonable,
2 Roll Ab.
265.
Hob. 107.

§ 32. It is said in *Rolle's Abridgment*, that a man cannot prescribe to have a chase or warren in any land but his demesnes, or in land within his fee and feignory. And also that, if a lord of a vill prescribes to have a warren in all the lands within the vill, held of him, this is not good: for *conies dig holes* in the land.

Tit. Prescrip.
(G.) Pl. 3, 4.

Vide Tit. 27.

§ 33. A prescription may, however, be reasonable, though it be unusual or inconvenient; as for man to have a way over a church-yard, or through a church.

2 Roll. Ab.
265.

§ 34. No prescription is good, which runs against the king's right: for it is a maxim of law, that *nullum tempus occurrit regi*.

Of void Prescriptions,
2 Roll. Rep.
364.

§ 35. A man cannot prescribe to do a wrong, or any thing that will be a nuisance to others; as, to erect a dove-cote or pigeon-house, on his lands, if it be a nuisance; or to lay logs of wood in the highway, and suffer them to continue there for a long time: for this is a nuisance, and against the public good.

Dowell v.
Sanders,
Cro. Jac. 491.
Fowler v.
Sanders.
Cro. Jac. 446.

§ 36. There can be no prescription against an act of parliament; because that is the highest proof and

1 Inst. 115 a.

matter of record in law. But yet a man may prescribe against an act of parliament, when his prescription is saved or preserved by another act of parliament.

Idem.

§ 37. Lord *Coke* says, there is a diversity between an act of parliament in the negative, and in the affirmative : for an affirmative act does not take away a custom. Moreover, there is a diversity between statutes, that be in the negative : for, if a statute in the negative be declarative of the ancient law, that is, in affirmance of the common law ; there, as well as a man may prescribe or alledge a custom against the common law, so a man may do against such statute : for *consuetudo privat communem legem*.

Id. n. 9.

§ 38. Mr. *Hargrave* has observed upon this passage, that this appears to be a good rule : for, if a statute is merely declaratory of the common law, the latter should be construed as it was before the recognition by parliament ; and, consequently, its operation should not be extended to the destruction of prescriptions, and customs, which were before allowable. As to the use of *negative* words in such a case, they may either arise from the subject, or be a *mode* of expressing what the common law is ; in either of which cases there cannot be any colour of reason for giving more effect to *negative* than belongs to *affirmative* words. In short, to say that a statute *merely declaratory* of the common law, being expressed in negative words, shall operate on subjects to which the common law is not applicable, seems to be a direct contradiction : for, how can a statute be *merely declaratory*,
if

if it is in *any degree introductive of a new law*? However, there are books, in which Lord *Coke's* distinction, in respect to negative statutes declaratory of the common law, is denied. See *W. Jo.* 270, 271. 289. If those, who oppose his opinion, had meant only to say, that in the instances, by which he illustrates this rule, the negative words of the statutes not only import something more than a declaration of the common law, but were also intended to annihilate all particular customs clashing with it, or, that on other accounts the instances were not apt, there might possibly be some colour for their dissenting from Lord *Coke*: but what is professed to be controverted, is the distinction itself, which, as we understand it, seems to be perfectly unexceptionable.

§ 39. Lord *Coke* says, the statute 34 *Edw. 1.* provides, that none shall cut down any trees of his own, within a forest, without the view of the forester. But, in as much as this act was in affirmance of the common law, a man may prescribe to cut down his woods, within a forest, without the view of the forester. This doctrine has been frequently denied; and is fully discussed by Mr. *Hargrave*, with his usual learning and ability. Idem.

§ 40. A man cannot prescribe against another's prescription: for the one is as ancient as the other. Aldred's Case
9 Rep. 57.
Thus, if a man prescribes for a way, light, or other easement, another cannot alledge a prescription to prevent the enjoyment of it. 2 Mod. 105

How a Prescription may
be lost,
1 Inst. 114 b.

§ 41. A prescription is lost, by unity of possession of as high and perdurable an estate, of the thing claimed, and of the land out of which it is claimed by prescription; because it is an interruption in the right.

4 Rep. 88.

§ 42. Where the subject matter of a prescription is destroyed, the prescription is lost; as, if the repair of a castle be claimed by prescription, and the castle be destroyed, the prescription is lost.

Cowper v.
Andrews,
Hob. 39.

§ 43. But an alteration in the quality of the thing, to which a prescription is annexed, will not destroy the prescription; as, if a person prescribes in a *modus decimandi* for tithes of a park, and the park is dis-parked, yet the prescription continues: for it is annexed to the land.

4 Rep. 87 a.

§ 44. So, if a man has estovers by prescription to his house, although he alters the rooms and chambers of it; as, to make a parlour where there was a hall, or a hall where the parlour was, and the like alteration of the qualities, and not of the house itself, and without making new chimnies, by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription. And, although he builds new chimnies, or makes an addition to his old house; by that he shall not lose his prescription: but he cannot employ any of his estovers in the new chimnies, or in the part newly added.

§ 45. A person

§ 45. A person having two old fulling mills, to which was annexed by prescription a right to a water-courfe, pulled them down, and erected two mills to grind corn. It was resolved, that, as the mill was the substance, and the addition demonstrated only the quality; and the alteration was not of the substance, but only of the quality, or the name of the mill, and that without any prejudice in the water-courfe to the owner, the prescription remained.

Luttrell's
Case,
4 Rep. 86 a.

§ 46. Sir *William Blackstone* observes, that “estates, gained by prescription, are not of course descendible to the heirs generally, like other purchased estates, but are an exception to the rule. For, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo*: and, therefore, if a man prescribes for a right of way, in himself and his ancestors, it will descend only to the blood of that line of ancestors, in whom he so prescribes; the prescription in this case being, indeed, a species of descent. But, if he prescribes for it in a *que estate*, it will follow the nature of that estate, in which the prescription is laid, and be inheritable in the same manner; whether that were acquired by descent or purchase: for every accessory followeth the nature of its principal.”

Descent of
Estates ac-
quired by
Prescription,
2 Comm. 266.

TITLE XXXI.

PRESCRIPTION.

CHAP. II.

Of the Statutes of Limitation.

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| <p>§ 1. <i>Negative Prescription.</i>
 4. <i>Statutes of Limitation.</i>
 5. <i>As to Writs of Right.</i>
 7. <i>As to Prescriptive Rights.</i>
 8. <i>As to Avowries.</i>
 10. <i>As to Writs of Formedon.</i>
 12. <i>As to Entry upon Lands and Ejectments.</i>
 21. <i>The Entry must be on the Land.</i>
 23. <i>And followed by an Action.</i>
 24. <i>Where a Person acquires a new Right.</i>
 27. <i>There must be an adverse Possession.</i></p> | <p>§ 34. <i>To what Persons and Estates these Statutes extend.</i>
 37. <i>Nullus Tempus Ad.</i>
 40. <i>What Persons and Estates are not within the Statutes.</i>
 41. <i>Ecclesiastical Corporations.</i>
 42. <i>Adowsons.</i>
 44. <i>Rents created by Deed.</i>
 47. <i>Fealty, &c.</i>
 49. <i>Savings in the Statutes of Limitation.</i>
 53. <i>Where Equity adopts the Doctrine of Limitations.</i></p> |
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Section 1.

Negative
Prescription.

THE second sort of prescription is that which arises from the several statutes of limitation; in consequence of which, no action can be brought for the recovery of lands or tenements after an uninterrupted possession of a certain number of years.

This kind of prescription is as antient as that which arises from immemorial usage: for *Bracton* says, Fo. 52 a. *“ Longa enim possessio (sicut jus) parit jus possidendi, et tollit actionem vero domino, quandoque unam, quandoque aliam, quandoque omnem; quia omnes actiones in mundo, infra certa tempora, habent limitationem.”*

It

It is different from the former; for, by that, a right is acquired to an incorporeal hereditament; but, by this last kind, the remedy for the recovery, either of a corporeal or incorporeal hereditament, is taken away; from whence, it is called a *Negative Prescription*.

§ 2. By the old law, no feifin could be alleged by the demandant in a real action, but from the time of Henry 1. By the statute of Merton, 20 Hen. 3. the feifin must have been alleged from the time of Hen. 2.; and by the statute of Westminster the first, 3 Edw. 1. c. 39., the feifin must have been alleged from the time of Richard 1.

1 Infl. 114 b.

2 Infl. 94.

Id. 238.

§ 3. The period, established by the last of these statutes, increased every day, till at last it was no limitation at all; so that it became necessary to fix a certain time, within which a claim to lands and tenements must be made; and beyond which, an undisturbed possession became a good title, by operating as a bar to every kind of action.

§ 4. This was effected by the statutes 32 Hen. 8. c. 32. and 21 Jac. 1. c. 16., which were made for quieting men's estates, and avoiding suits; and which have, therefore, been called *Statutes of Repose*.

Statutes of Limitation.

§ 5. The first section of the statute 32 Hen. 8. enacts, that no person shall have any writ of right of any manors, lands, tenements, or hereditaments, of the possession of their ancestor or predecessor, but only of

As to Writs of Right.

of the seisin of such ancestor or predecessor, within sixty years next before the *teste* of the same writ.

Dally v.
King,
1 Hen. Black.
K. i.

§ 6. In consequence of this statute, a writ of right cannot be now maintained by any person, without shewing an actual seisin by taking the *esplées* or profits, either in the demandant himself, or the ancestor under whom he claims, within sixty years,

As to pre-
scriptive
Rights.

§ 7. As to rights acquired by immemorial usage, it has already been stated, that they might formerly have been claimed, though the actual enjoyment of them had been suspended for any number of years : but, in consequence of the first section of this statute, no person can now prescribe for any hereditaments of the possession of his ancestors or predecessors, but only of the seisin or possession of such ancestors or predecessors, who shall be seised of such hereditaments within sixty years before the said prescription, made or had. But a prescription in a *que estate* is not within this statute.

Brook. Read.
4.

As to Avow-
ries.

§ 8. By the fourth section of this statute, it is enacted, that no person or persons shall make any avowry or cognizance for any rent, suit, or service, and allege any seisin thereof in the possession of his or their ancestors or predecessors, or in his own possession, or in that of any others; above fifty years next before the making of the said avowry or cognizance.

4 Rep. 10 a.

§ 9. In all these sections of the statute 32 Hen. 8. the word seisin is used indefinitely ; and, therefore, if the act had gone no farther, this word should be con-

strued according to the subject matter, sometimes for actual seisin, sometimes for seisin in law : and therefore, as to the writ of right, it shall be intended of an actual seisin ; and, as to avowries, it extends to seisin in law, as well as to seisin in fact, or actual seisin.

§ 10. By the statute 21 Jac. 1. c. 16, f. 1. all writs of *formedon in descender*, remainder, or reverter, of any manors, &c. must be sued and taken within twenty years next after the title and cause of action first descended or fallen ; and at no time after the said twenty years.

As to Writs
of Formedon.

§ 11. In consequence of the words “ first descended or fallen,” if a person entitled to an estate tail, with remainder over, neglects to bring his writ of formedon within twenty years after his right accrues, he and his issue will be for ever barred. But the person in remainder will be allowed twenty years, from the determination of the preceding estate tail, to bring his writ of formedon, although such preceding estate tail should continue for centuries.

§ 12. By the same statute, it is farther enacted, that no person shall make any entry into lands, &c. but within twenty years next after his right or title, which shall first descend or accrue to the same ; and, in default thereof, such person so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made.

As to Entry
upon Lands
and Eject-
ments.

§ 13. In consequence of this last clause in the statute 21 Jac. 1., a peaceable possession for twenty years takes

Jenk. 16. c. takes away an entry ; and a release of all actions would, in that case, give a right : and there would be no remedy for the fee-simple by writ of right, after such possession, and a release of actions.

Tit. 29. c. 1. § 14. It has been stated in a former title, that, where a person has a right of possession, it is usually and properly called a *Right of Entry*. And 'as no person can maintain any ejectment without such a right of entry, it follows, that twenty years adverse possession is a good bar to an ejectment.

Stocker v.
Berney,
1 Ld. Raym.
741.
2 Salk. 421.

§ 15. An uninterrupted possession for twenty years, not only gives a right of possession which cannot be divested by entry, but also, gives a right of entry ; so that, if a person, who has had such a possession, is turned out, he may lawfully enter, and bring an ejectment for its recovery, upon which he will be entitled to judgment. So that a possession for twenty years, in this case, forms a positive prescription.

1 Inf. 332 b. § 16. Where an estate tail is discontinued, the estates in remainder and reversion expectant thereon are divested, and the issue in tail, and also the persons entitled to the estates in remainder and reversion are barred of their entry, and driven to their action.

Id. 325 a.

§ 17. An estate tail may be discontinued by five different modes of conveyance ; feoffment, fine, recovery, release, and confirmation with warranty. But no person can create a discontinuance, who is not in the

Driver v.
Hufley,
1 H. Black.
R. 269.

the actual possession of the estate tail by force of the intail.

§ 18. Where a tenant in tail conveys away an estate, without creating a discontinuance, the right of entry of the issue in tail is not taken away; and, therefore, the issue may enter, and bring an ejectment, at any time within twenty years after the death of the tenant in tail. But, if the tenant in tail makes a lease, which is valid against the issue, the right of entry is thereby postponed to the determination of the lease, and the twenty years will not begin to run till that period.

§ 19. If a lease be void, or be considered as a trust for the person entitled to the inheritance, it will not, in that case, create an adverse possession; and, consequently, will not prevent the statutes of limitation from running.

Infra.

§ 20. By an indenture of settlement, made in the year 1668, the estates in question were limited to the use of Sir Robert Atkins the elder for life, remainder to Sir Robert Atkins the younger, and the heirs male of his body by his then intended wife, remainder to the right heirs of Sir Robert Atkins the elder, with a power to Sir R. Atkins the elder and Sir R. Atkins the younger, when they should be respectively in possession, to demise the said premises to any person or persons, for one, two, or three lives, reserving the usual rents; and also a power to Sir Robert Atkins the father, to limit the premises to the use of any woman he should

Taylor v.
Horde,
1 Burr. Rep.
60.

marry, for her life, by way of jointure. Sir *Robert Atkyns* the father, in 1681, made an appointment of the premises, by way of jointure, to *Ann Dacres* for her life, and soon after married her.

Sir *Robert Atkyns* the father, by indenture, dated in 1698, under his hand and seal, and attested by three witnesses, between himself of the one part and *Thomas Dacres* of the other part, reciting his power of leasing; in consideration of the rent reserved, and in pursuance of the said power, demised the premises to *Thomas, Robert, and John Dacres*, and their assigns, for and during their natural lives, and the life of the longer liver of them, reserving a yearly rent of 360 *l.* And in this lease was contained the following clause: “ The true intent and meaning of this estate or term for lives, so hereby granted and made to the said *Thomas Dacres, R. Dacres, and John Dacres*, and the survivor of them, being to preserve the said remainder so limited in the premises by the said recited indenture, to the right heirs of the said Sir *Robert Atkyns* party to these presents, and to such person or persons to whom the said Sir *R. Atkyns* shall any way dispose of the same, from being barred by any recovery to be suffered, or by any other act to be attempted or done for the barring of the same.” *John Dacres* alone executed a letter of attorney, reciting the said lease, and empowered *Thomas Barker* to take livery of the premises from Sir *Robert Atkyns* the father, for himself, and for *Thomas and Robert Dacres*, and every of them in their names, and for their use, according to the purport of the said indenture,

ture, and to enter and take possession of the said premises, to the use of them and every of them.

Sir *Robert Atkyns* the father did, in his own person, deliver seisin and possession of the said premises to the said *Thomas Barker*, to the use of the said *Thomas, Robert*, and *John Dacres*. But the lessees were never in possession of the premises in question, otherwise than by the said livery : nor did they ever receive or pay any rent, for or in respect of the said premises ; and the said lease was not found in the custody of *Thomas Dacres*, the surviving lessee, at the time of his death.

Sir *Robert Atkyns* the father made his will in 1708, and thereby devised his reversion in fee in the premises in question, and also the lease made to the *Dacres* by *John Tracy* the lessor of the plaintiff, (who afterwards took the name of *Atkyns*), in tail, with several remainders over.

Sir *Robert Atkyns* the father died in 1709 ; whereupon his widow entered upon the premises, claiming the same for her life as her jointure, and was in possession.

Sir *Robert Atkyns* the younger brought an ejectment against his father's widow, for the recovery of the premises in question, when a verdict was found for the plaintiff, and judgment entered up accordingly.

Soon after this judgment was obtained, and during the life of the widow, Sir *Robert Atkyns* the son entered

tered into, and was in possession of the premises, and, by indenture of feoffment, conveyed the same to *James Earl* and his heirs, for the purpose of making him a tenant to the *præcipe*, in order that a common recovery might be suffered thereof to the use of *Sir Robert Atkyns* the son, in fee-simple; and livery of seisin was given to the said *James Earl*, and a common recovery duly suffered, to the said uses.

Sir Robert Atkyns continued in possession until *November 1711*, when he died without issue male of his body by *Louis* his wife, who survived him.

Dame Ann Atkyns, the widow of *Sir Robert Atkyns* the father, brought an ejectment in the King's Bench in *Hilary term 1711*, for the recovery of the said premises; and, having obtained a verdict and judgment thereupon, entered into possession of the same premises, and continued in possession thereof until the 9th of *October 1712*, when she died.

Soon after the death of *Dame Ann*, *Robert Atkyns*, who was nephew and heir at law of *Sir Robert Atkyns* the son, entered into the premises in question, and continued in possession until *March 1753*, when he died; *Thomas Dacres*, the survivor of the three persons named in the lease, died in *July 1752*.

John Atkyns, the lessor of the plaintiff, never was in possession of the premises, or entered thereon, until the *15th December 1752*, when he entered upon the same, claiming as devisee under, and by virtue of the will of
Sir

Sir *Robert Atkyns* the father, and demised to the plaintiff.

Two great questions arose upon this case. 1st, Whether the recovery was good and valid to bar the reversion in fee which was devised to *John Atkyns*. 2d, whether, supposing the recovery was bad, the plaintiff was barred by the statute of limitations. The Court of King's Bench being of opinion, that the recovery was bad, and, therefore, did not bar the claim of the plaintiff, it then became necessary to determine, whether the lessor of the plaintiff had made his entry within twenty years after his title accrued, for, otherwise, he was barred of his remedy by the statute of limitation. I shall state the opinion of the court, as delivered by Lord *Mansfield* on this last question.

An ejectment is a possessory remedy, and only competent when the lessor of the plaintiff may enter : therefore, it is always necessary for the plaintiff to show, that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years adverse possession is a positive title to the defendant ; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession. Every plaintiff in ejectment must shew a right of possession as well as of property, and, therefore, the defendant needs not plead the statute, as in the case of actions. The question, then, is, whether it appears, that the lessor of the plaintiff might enter, when he

brought this ejectment. On the 9th *November* 1711, Sir *Robert Atkyns* the younger died without issue male. On the 10th of *October* 1712, *Lady Atkyns* the joint-ress died. Then accrued the title of entry of the lessor of the plaintiff; his only excuse for not entering is, that he was prevented by the lease to the three *Dacres*. That upon the death of *Thomas Dacres*, the surviving lessee, on the 23d *July* 1752, a new title of entry accrued, upon which he entered on the 15th *December* 1752, and brought this ejectment. Three answers are given, any one of which, if well-founded, is sufficient.

1st, That the lease was absolutely void, and of no effect.

2d, If good, it determined by the estate tail being spent, by the express tenor of the demise.

3d, If subsisting, yet, upon the extinction of the estate tail, it was a trust to attend the inheritance in the lessor of the plaintiff, and made part of his title-deeds, therefore could not stop the statute's running, to protect an adverse possession, nor give him any new right of entry.

1st, That the lease was void. Sir *Robert Atkyns* the father being only tenant for life, could by virtue of his ownership make no estate, to continue after his death; this lease, therefore, after his death, can only be supported by his power, if it was made pursuant to it: whether it was made pursuant to his power, is the question.

1st, It

1st, It is no lease at all; the very definition of a lease is, a contract between lord and tenant, by which both are bound in mutual stipulation.* But the lessees are not bound by this lease, they never executed it; nor does it appear that they knew or consented to it.

2d, Supposing the lease to be good, it determined when the estate tail in Sir *Robert Atkyns* the younger was spent, by the express terms of the demise.

3dly, Supposing the lease to be valid and subsisting, it is a trust, and devised as such to attend the inheritance of the lessor of the plaintiff, which came into possession the 9th of *October* 1712, at which time his title and right of entry first accrued.

This lease was one of his muniments, a mere weapon in his hands; and it would be going a great way to say, such a form should take from an adverse possession the benefit of the statute.

Judgment was given for the defendants.

A writ of error was brought in the House of Lords. The counsel were allowed to argue the last point first; because, if their Lordships should be of the same opinion with the Court of King's Bench, that this ejectment was barred by the statute of limitations, it would be quite unnecessary to go into the first question.

6 Bro. Parl.
Ca. 633.

All the Judges were ordered to attend, to whom, after the arguments at the Bar were over, the House proposed the following question.

“ Whether sufficient appears, by the special verdict in this case, to prevent the lessor of the plaintiff, by force of the statute of limitations of the 21st of king *James* the first, from recovering in this ejectment?”

Whereupon, the Lord Chief Justice *Willes* having conferred with the rest of the Judges, delivered their unanimous answer; “ That sufficient does appear, by the special verdict in this cause, to prevent the lessor of the plaintiff by force of the statute of limitations of the 21 *Jac.* 1. from recovering in this ejectment.”

Whereupon, the judgment of the Court of King's Bench was affirmed.

The Entry
must be on
the Land.

§ 21. With respect to the entry or claim, which is required to preserve a right, it has been resolved; that, in proving an entry or claim, it is necessary to produce evidence of its being made upon the land claimed, unless there be a special reason to the contrary; and also that it was not a casual entry, but that it was made *animo clamandi*.

Ford v. Grey,
6 Mod. 44.
; Salk. 285.

Gree v. Rolle,
1 Ld. Raym.
716.

§ 22. On a special verdict, the single question was, whether the entry of *cestui que trust* would be sufficient to avoid the statute of limitations, 21 *Jac.* 1. And it was

was held clearly by the whole court, that such entry was sufficient to avoid the statute, and that they would not hear an argument on the point.

§ 23. By the statute 4 Ann. c. 16. s. 16. it is enacted, that no claim or entry, to be made of or upon any lands, tenements, or hereditaments, shall be sufficient within the statute of limitations; unless, upon such entry or claim, an action shall be commenced within one year, next after the making of such entry or claim, and be prosecuted with effect.

And followed by an Action.

§ 24. Where a person acquires a new right, he is allowed a new period of twenty years to pursue his remedy, though he has neglected the first; it being a maxim in law, *Quando dua jura in unâ personâ concurrunt, æquum est ac si essent in diversis.*

Where a person acquires a new Right.

§ 25. A tenant in tail of lands, held in ancient demesne, conveyed them by fine in the court of ancient demesne to three persons, for their lives; and afterwards levied another fine of the reversion, in the same court, to the use of himself and his heirs.

Hunt v. Bourne,
1 Salk. 339.
2 Salk. 421.

It was determined, that the first fine created a discontinuance of the estate, and took away the entry of the issue in tail during the lives of the three persons, to whom the first fine was levied; but that the second fine did not make any discontinuance: and therefore, although the issue in tail had neglected to bring his formedon within twenty years after the death of his ancestor, when his right first accrued; yet, when the

last life dropped, the discontinuance was determined, and the heir acquired a new right of entry, for the pursuit of which he was allowed by the statute 21 Jac. 1. a new period of twenty years. For, when a person has a right, and several remedies, the discharge of the one is not a discharge of the other: and the word "right," in the statute of limitations, means a right of entry.

4 Bro. Par.
Ca. 66.

Upon a writ of error in the House of Lords, it was contended for the plaintiff, 1st, That the fine did not create a discontinuance, the consequence of which was, that the right of entry of the issue in tail commenced immediately on the death of the tenant in tail, which happened in 1663, above twenty years before the issue entered, and therefore his entry was barred by the statute of limitations. 2dly, That the discontinuance, if any, did not determine with the estate for three lives, but still continued to bar the entry of the issue in tail by the common law; because a fee passed by the first fine to the cognizee, and therefore the discontinuance was of the whole fee. But if the first fine alone did not work a discontinuance in fee yet the second fine and warranty did, in order that the warranty might be preserved. 3dly, That the entry was barred by the statute of limitations, which enacts, that no person shall enter into lands but within twenty years after his right or title shall first descend or accrue. In this case the first right or title that descended, was a right of action, *viz.* to a formedon, which accrued to the issue immediately on the death of the tenant in tail, which happened above thirty-five years before, and the issue having neglected for above
twenty

twenty years to sue for the estate was thereby barred, not only of his action, but of his entry also. For otherwise a man might enter into lands when he had no way by law to recover them, having lost that remedy by his own default; which would be absurd and inconvenient with respect to purchasers, and the disturbance of long possessors.

On the other side it was contended that the only question in the case was, whether the lessor of the plaintiff might lawfully enter after the determination of the estate for three lives, granted by the first fine; for it was not pretended that a fine levied in a court of ancient demesne would bar an estate tail. That the first fine made a discontinuance of the estate and took away the entry of the tenant in tail during the lives of the lessees only; but that the grant of the reversion, by the second fine, did not make a discontinuance in fee; and consequently when the last life dropped in *September 1793* the discontinuance was determined, and the right of entry revived: and therefore the issue in tail might lawfully enter, and was not barred by the statute of limitations, his right not accruing till 1693.

The judgment was affirmed.

§ 26. It is said by Lord *Hardwicke*, that a remainderman, expectant on an estate for life or years, to whom a right to enter, or to bring an ejectment, is given by the forfeiture of the tenant for life or years, is not bound to do so. Therefore, if he comes within his

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his time after the remainder attached, it will be good : nor can the statute of limitations be insisted on against him, for not coming within twenty years after his title accrued by forfeiture.

There must
be an adverse
possession.

9 Rep. 106 a.

§ 27. No person can be barred by the statutes of limitation, unless he is out of possession. Thus, Lord Coke, speaking of the statute of fines, which is in fact a statute of limitations, says, “He, who has the estate or interest in him, cannot be put to his action, entry, or claim : for he has that, which the action, entry, or claim, would vest in or give him.”—From which it follows, that no person can plead the statutes of limitations, unless his possession has been adverse to that of the person who claims against him,

Run. Eject.
60.

§ 28. A person is not affected by the statutes of limitation, where the possession is in the hands of his tenant, who has paid him rent within the time of limitation : for, the possession of a lessee for years is the possession of his lessor, and payment of rent is an acknowledgement of the possession ; so that, during the continuance of the lease, and payment of rent, the lessor is in no sort of default : for he cannot enter and take the actual possession, till the lease be expired, but then it seems he should, because his right of entry then first accrues.

§ 29. Where a person has conveyed away the legal estate in lands to a trustee for himself, for any particular purpose, and continues to hold the possession ;
he

he becomes tenant at will to such trustee; and, his possession not being adverse to the title of the trustee, the statutes of limitation will not operate in such a case.

§ 30. Joint tenants, coparceners, and tenants in common, having a joint possession, and occupation of the whole; it follows, that the possession of any one of them is the possession of the others or other of them, so as to prevent the statutes of limitation from affecting them: nor will the bare perception of all the rents, and profits, by one, amount to an ouster of the other. Vide Tit. 18, 19, 20.

§ 31. In ejectment on a trial at bar, the statute of limitations was insisted on; but it was ruled by the court, that the possession of one joint-tenant was the possession of the other; so far as to prevent the statute of limitations. Ford v. Grey, 1 Salk. 285. 6 Mod. 44. 2 Atk. 632.

The same point was determined as to coparceners in the case of *Davenport v. Tyrnell*; and, as to tenants in common, in the case of *Fairclaim v. Shackleton*, which have already been stated. Tit. 19. f. 9. Tit. 20. f. 13.

§ 32. A person being seised in fee, having two daughters, devised his lands to his grandson by his eldest daughter in fee, the eldest daughter being dead at the time of the devise. The grandson died without issue; and the heir of the grandson being the heir on the part of the father, and the heir of the coparcener, entered into the land, and took the profits by moieties for Reading v. Roylton, 2 Salk. 422.

for twenty years together ; thinking, according to the opinion of Lord *Hale* in his younger years (who was then counsel) that the devise was void for one moiety.

Now, the mistake being discovered, the heir of the grandson brought an ejectment against the heir of the other coparcener ; and, upon a special verdict found, it was objected in his behalf, that the devise was void as to one moiety, but, this being over-ruled,* it was then objected that the bringing of this ejectment against the heir of the coparcener, for this moiety, admitted the plaintiff to be out of possession for twenty years ; and then he was barred by the statute of limitations.

The court, however, laid it down, that the statute of limitations never runs against a man, but where he is actually ousted or disseised : and true it is, one tenant in common may disseise another ; but then it must be done by actual disseisin, and not by bare perception of the profits only.

Roe v.
Ferrars,
2 Bosanq.
542.

§ 33. In ejectment, a verdict was found for the plaintiff, subject to the opinion of the court, whether the plaintiff's right of recovery was not barred by the statute of limitations.

The lessors of the plaintiff, who were lords of the manor of *Beddington* in *Surry*, fought to recover the

* It was contended that the grandson took one moiety by descent.—Vide 1 *Salk.* 242.

lands, as parcel of the manor, against the defendant ; who was rector of the parish, and claimed them as parcel of the rectorial glebe. The lords of the manor had a right of presentation to the rectory, and were also entitled to a portion of the tithes. At various times, there had been a mutual exchange of lands and tithes, between the lords of the manor and the rectors which had given rise to much confusion concerning their respective rights. To prove possession in the lessors of the plaintiff, a deed was produced, dated in 1703, by which the then lord of the manor demised to the rector the lands in question, for forty years, reserving a certain rent : and the rector covenanted with the lessor, that he and his heirs should have the tithe of oats of the parish. The rectors continued to hold the possession after the expiration of the lease, but withheld the rents for upwards of twenty years, and the lords of the manor continued to take the tithe of oats.

The court was of opinion, that possibly, at the time when the rent was withheld, it was agreed between the then rector and the lord of the manor, that, if the latter were permitted to receive the tithe, as before, the former should be permitted to retain the land demised; and, therefore, that the possession of the land by the rector was not adverse, so as to let in the operation of the statute of limitations.

§ 34. With respect to the persons and estates, to which the statutes of limitation extend; all natural persons, and all estates in land, whether freehold or

To what
Persons and
Estates these
Statutes ex-
tend.
for

2 Inst. 95.

for years, are within them; and also customary rents, of which feisin is the proper proof, and suit and service.

Gillb. Ten.

178.

3 Term Rep.

172.

§ 35. The statutes of limitation extend to copyhold estates; for these acts were made for the preservation of public quiet, and no ways tend to the prejudice of the lord or tenant. And actions concerning copyholds are as fully and plainly within the words of these acts, as any other actions; and so there is no reason to exclude them from the meaning.

6 Bro. Par.
Ca. 146.

§ 36. Offices are held to be within the meaning of the statutes of limitation; and, in the late contest for the office of Lord Great Chamberlain, all the Judges were of opinion, that the right of Lord *Percy*, and also that of the Dutchess of *Atbol*, to that office, were barred by the statutes of limitation.

Nullum
Tempus Act.

Lee v. Norris,
Cro. Eliz. 331.
Run. on Eject.
59.

§ 37. It has been stated, that, by the common law, no prescription could be maintained against the king; nor was he bound by the statute 32 Hen. 8. And this privilege extended to his lessee: as, where *A.* had a lease for ninety-nine years from the crown, and was out of possession for more than twenty years; yet he recovered in ejectment: for *A.*'s possession was that of the king, against whom the want of possession could not legally be objected.

§ 38. By the statute 21 Jac. I. c. 2. it was enacted, that a quiet and uninterrupted enjoyment, for sixty years before the passing of that act, of any estate originally

originally derived from the crown, should bar the crown from any right or suit to recover such estate, under pretence of any flaw in the grant, or other defect of title.

§ 39. This act, at the time it was made, secured the rights of such, as could prove a possession of sixty years; but, from its very nature was continually diminishing in its effect, and departing from its principle: so that some new law became every day more necessary, to secure the possessions of the subject from the claims of the crown. It was therefore enacted, by the statute 9 *Geo. 3. c. 16.* “ That the king’s majesty, his heirs or successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons, bodies politic or corporate, for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever, (other than liberties or franchises), or for or in any wise concerning the revenues, issues, or profits thereof, or make any title, claim, challenge, or demand, for or into the same, by reason of any right or title, which hath not first accrued and grown, or which shall not hereafter first accrue and grow, within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding, as shall at any time or times hereafter be filed, issued, or commenced, or recovering the same or in respect thereof; unless his majesty, or some of his progenitors, predecessors, or ancestors, heirs, or successors, or some other

“ other person or persons, bodies politic or corporate,
 “ under whom his majesty, his heirs or successors,
 “ any thing hath or lawfully claimeth, or shall have
 “ or lawfully claim, have or shall have been answered
 “ by force and virtue of any such right or title to the
 “ same rents, revenues, issues and profits thereof, or
 “ the rents, issues, and profits of any honor, manor,
 “ or other hereditaments, whereof the premises in
 “ question shall be part or parcel, within the space of
 “ sixty years; or that the same have or shall have
 “ been duly in charge to his majesty or some of his
 “ progenitors, predecessors, or ancestors, heirs, or
 “ successors, or have or shall have stood *insuper* of
 “ record, within the said space of sixty years.”

What Persons
and Estates
are not within
these Statutes.

§ 40. There are several persons and estates, not comprehended within the statutes of limitation; and which, therefore, are not affected by being out of possession for any indefinite time.

Ecclesiastical
Corporations.

§ 41. Ecclesiastical corporations, and, generally, all ecclesiastical persons who are seized in right of their churches, and have not an absolute estate in their possessions, being restrained from alienation by several positive statutes, are not bound by any of the statutes of limitation; and, therefore, cannot bar their successors by neglecting to bring actions for the recovery of their possessions, within the time prescribed by those statutes: and this agrees with the principles

Magdalen
Coll. Case,
Tit. 35.

Lib. 5. c. 29.
f. 3.

of old law, as laid down by *Bracton*.—*Illud enim, ut videtur observari, deberet de jure et feodo ecclesiæ, si rector clameum non opposuerit, quod ecclesiæ non præjudicatur,*

dicatur, cum fungatur vice minoris, non magis quam minori si custos clameum non apposuerit.

Where an ecclesiastical person neglects to bring his action within the time required, he himself will be barred, but not his successor. Plowd. 358.

§ 42. There is no limitation as to the time within which any actions touching advowsons are to be brought; at least, none later than the time of *Rich. 1.*: for, by the statute 1 *Mary* sect. 4. it is enacted, that the statute 32 *Hen. 8.* shall not extend to a writ of right of advowson, *quare impedit, darrein presentment, &c.*; and, by the statute 7 *Ann* c. 18. it is enacted, that no usurpation shall displace the estate of the patron, and that he may present on the next avoidance, as though there had not been any usurpation; which provision, in effect, takes away all limitations of suits about the right of patronage. Advowsons.
1 Inst. 115 a.
n. 6.

§ 43. Tithes are not within the statutes of limitation; and, in a case where a bill was filed in the Court of Exchequer for tithes, the court would not allow a plea of the statute of limitations: and Lord Chief Baron Gilbert said the reason was, that tithes were not of the nature of those demands, which were intended to be barred by that statute. Quilter v. Mustendine, Gilb. R. 228.

§ 44. Where a rent is created by deed or grant, of which the commencement can be shewn, it is not within the statutes of limitation. Rents created by Deed.
1 Inst. 115 a.

Foster's Case,
3 Rep. 64.

§ 45. Where *A.*, by deed indented, made a feoffment in fee to *B.* and his heirs, rendering 10 s. *per annum* rent to *A.* and his heirs; of which rent, the heirs of *A.* had not been seised for forty years: it was determined, that they might distrain for it. For the statute 32 *Hen.* 8. was intended to operate only where the avowant was driven to allege a seisin by force of some old statute of limitation; and that was, when the seisin was material, and of such force, that it should not be avoided in avowry, although it were by encroachment, as between the lord and tenant. But, in the case of reservation or grant of a rent, there the deed is the title, and the beginning thereof appears: no encroachment, in that case, shall hurt, nor is any seisin material. And this construction stands with the words of the act. "No man shall make avowry, and "allege seisin," &c.; by which it appears, that that branch extends only where the avowant ought to allege seisin; but, where no seisin is requisite, it is out of the words and intent of the act: for it intends to limit a time for the seisin; which seisin is required by law to be alleged, and not to compel any one to allege seisin, where seisin is not necessary before.

1 Inst. 115 a.
n. 5.

§ 46. The exemption of rent, from the statute 32 *Hen.* 8. should be understood with this qualification, that the certainty of the rent should appear in the deed; because, otherwise, the *quantum* of the rent is no more ascertained by the deed than if there was not one existing. If, therefore, the rent is created by reference to something out of the deed, as by reserving such rent as the person reserving pays over, without expressing

expressing what that is; and the latter, not having commenced by deed, is one, of which seisin is the proper proof: in such a case, seisin is equally necessary to both rents, and, consequently, both ought to be equally deemed within the statute 32 Hen. 8.

Collins v.
Goodal,
2 Vern. 255.
S. P.

§ 47. Fealty is within the letter of the statute 32 Hen. 8.; yet Lord Coke says, that, and all other accidental services, as heriot service, or to cover the lord's hall, and the like, (for that they may not happen within the times limited by that act), are, by construction, out of the meaning of it.

Fealty, &c.
1 Inst. 115 a.
2 Inst. 95, 96.

§ 48. Bond-debts, and other specialties, are not within the statutes of limitation; but, where an action is brought on a bond, and the money does not appear to have been demanded, or interest, within twenty years, this amounts to a presumption that it has been paid.

Bonds, Debts,
&c.
Oswald v.
Legh,
1 Term R.
270.

§ 49. The statute 32 Hen. 8. contains a saving for infants, married women, persons in prison, or out of the realm, provided they bring their writs or actions, or make their avowries, within six years after the removal of their disabilities.

Savings in the
Statutes of
Limitation.

§ 50. By the statute 21 Jac. 1. c. 2. it is further enacted, "That, if any person, &c. that is or shall be
"entitled to such a writ or writs, or that hath or shall
"have such right or title of entry, be or shall be, at
"the time of the said right or title first descended,
"accrued, or fallen, within the age of twenty-one
"years, feme covert, *non compos mentis*, imprisoned,

- “ or beyond the seas, such person, &c. and his and
 “ their heir and heirs, shall or may, notwithstanding
 “ the said twenty-years be expired, bring his action or
 “ make his entry, as he might have done before this
 “ act, so as such person, &c. or his and their heir
 “ and heirs shall, within ten years next after his and
 “ their full age, discovery, coming of sound mind,
 “ enlargement out of prison, or coming into this
 “ realm, or death, take benefit of and sue for the
 “ same, and at no time after the said ten years.”

Doe v. Jones,
 4 Term Rep.
 300.
 Tit. 35.

§ 51. Upon the construction of this clause it has been held, that the disabilities here mentioned, must exist at the time when the right first accrues: for, if the time once begins to run, no subsequent disability will avail.

King v.
 Walker,
 1 Black. R.
 286.

§ 52. In a modern case, the Court of King's Bench appears to have been of opinion, that the statute of limitations extends to persons in *Scotland*: for the statutes 21 Jac. 1. and 5 Ann, were both express, that the party to be excused must be beyond seas. Before the Union, *England* was an island of itself; since the Union, *Scotland* is made a part of it; and, therefore, a person in *Scotland* is not out of the realm.

Where Equity
 adopts the
 Doctrine of
 Limitations,
 1 Ld. Raym.
 935.
 2 Burr. 961.
 Treat. of Eq.
 B. 3. c. 1. f. 7.

§ 53. The statutes of limitations only fix certain periods, within which different real and personal actions may be brought in the courts of common law, and, therefore, do not extend to suits in equity. But, the limitation of suits being founded in public convenience,
 and

and attended with so much utility, the courts of equity have adopted the principles established by these statutes, as positive rules for their own conduct.

§ 54. It has therefore been long settled, that, where a mortgagee has been in possession for twenty years, that circumstance may be pleaded to a bill to redeem; because, in that case, the Court of Chancery considers the right of redemption to have been abandoned. But Lord *Hardwicke* says, that insisting on length of time against a bill to redeem, is only a kind of equitable bar, and taken by way of analogy to the statute of limitations.

White v. Ewer,
2 Vent. 340.

Aggas v. Pickerell,
3 Atk. 225.

§ 55. There are, however, several cases, in which courts of equity have refused to adopt the principles of the statute of limitations. Thus, it is generally said, that a trust is not within the statute of limitations; but this proposition is only applicable to cases, arising between the *cestuique* trust and his trustee, where there is no adverse possession. And Lord *Hardwicke* says, this rule holds only as between *cestuique* trust and his trustee on the one side, and strangers on the other: for that would be to make the statute of no force at all; because there is hardly any estate of consequence without such trust, and so the act would never take place. Therefore, when a *cestuique* trust and his trustee are both out of possession, for the time limited, the party in possession has a good bar against both of them.

2 P. W. 145.

Llewellyn v. Mackworth,
15 Vin. Ab.
125. pl. 1.

§ 56. Where fraud is charged, the defendant cannot plead the statute of limitations to the discovery of his title, but must answer to the fraud.

Bicknell v.
Gough,
3 Atk. 558.

§ 57. A bill was brought for the discovery of the defendant's title, charging fraud in the defendant, and praying to be let into possession of the estate. The defendant pleaded the statute of limitations, both to the discovery and relief.

Lord Chancellor.—I am of opinion, the defendant cannot plead the statute of limitations to the discovery, but must answer the fraud; and that, as the defendant has pleaded it, it is in the nature of a demurrer: for, the defendant not averring any fact to which the plaintiff might reply, but resting it on facts of the plaintiff's own shewing, if I was to allow the plea, the plaintiff could not take exceptions to the answer; and, therefore, overruled the plea.

Llewellyn v.
Mackworth,
15 Vin. Ab.
125. pl. 8.

§ 58. In another case, Lord *Hardwicke* is reported to have said;—"There may be a case, where the circumstance of *concealing a deed* shall prevent the statutes barring; but then it *must be a voluntary and fraudulent detaining*: for, to say that *merely having* an old deed in one's possession, shall deprive a man of the benefit of the act, is going too far, and would be a hard construction of a statute for quieting possessions. It must, therefore, be an intentional concealment."

§ 59. A legacy given out of real property, is only recoverable in a court of equity, and therefore is not within the statute of limitations; from which, it follows, that length of time alone will not bar it, but it will raise a presumption of payment, which, unless repelled by evidence of particular circumstances, will be conclusive.

1 Vern. 256.

Fotherby v.
Hartridge,
2 Vern. 21.

§ 60. In a modern case, where a bill was brought for the payment of a legacy, which was resisted on the ground of presumed payment, arising from the length of time that had elapsed without any demand, which was above forty years; and, because the representatives, both real and personal, and all the persons who could throw any light upon the subject, were dead: Lord Commissioner *Eyre* said,—“ It is a presumption of fact, in legal proceedings before juries, that claims, the most solemnly established on the face of them, will be presumed to be satisfied after a certain length of time, courts of equity would do very ill by not adopting that rule. So essential is it to general justice, that, though the presumption has often happened to be against the truth of the fact; yet it is better for the ends of general justice, that the presumption should be made and favoured, and not be easily rebutted, than to let in evidence of demands of this nature, from which infinite mischief and injustice might arise.”

Jones v.
Tuberville,
2 Vef. Jun. 116.

§ 61. It is said that, if a person sues in Chancery, and, pending the suit there, the statute of limitations attaches on his demand, and his bill is afterwards dis-

Gilbert v.
Emerton,
2 Vern. 503.

missed,

Mackenzie v.
Lord Powis
7 Bro. Parl.
Ca. 282.

Anon. 2 Cha.
Ca. 217.

modified, the matter being properly determinable at law, the court will preserve the plaintiff's right, and will direct that the defendants shall not plead the statute of limitations, in bar to the demand. But, in another case, it was said that the Court of Chancery would not allow the statute of limitations to be pleaded, unless the party in such suit was stayed by act of the court, as, by an injunction.

END OF THE THIRD VOLUME.

